TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 647

DAVID S. BARRY, SERGEANT-AT-ARMS OF THE U. S. SENATE, AND JOHN J. MADDEN, DEPUTY SERGEANT-AT-ARMS, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA EX REL. THOMAS W. CUNNINGHAM

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JUNE 15, 1928.

CERTIORARI DENIED JUNE 25, 1928.

[illegible] to [illegible] as a [illegible]
[illegible] [illegible] is [illegible] by [illegible] ! [illegible]
[illegible] attitude of [illegible]
[illegible] cause.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No.

DAVID S. BARRY, SERGEANT-AT-ARMS OF THE U. S. SENATE, AND JOHN J. McGRAIN, DEPUTY SERGEANT-AT-ARMS, PETITIONERS,

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. M-131

UNITED STATES OF AMERICA ex Rel. THOMAS W. CUNNINGHAM

v.

DAVID S. BARRY, Sergeant-at-Arms of U. S. Senate, and JOHN J. McGRAIN, Deputy Sergeant-at-Arms

J. Elwood Dukes, Benjamin M. Golder, Otto Kraus, Jr., Ruby R. Vale, Howard Benton Lewis, George W. Wickersham.

DOCKET ENTRIES

Mar. 26, 1928. Petition for Writ of Habeas Corpus and Order of Court granting prayer of petition filed.
" 26, " Writ of Habeas Corpus exit.
" 26, " Stipulation of counsel that bond of Relator be $1,000 and Order of Court approving stipulation filed.
" 26, " Bond of Relator with surety in $1,000 filed.

[fol. 2]

" 29, " Writ of Habeas Corpus returned "C. C." and filed.
Apr. 5, 1928. Return of J. J. McGrain, Deputy Sergeant-at-Arms of the Senate of the U. S. to the Writ of Habeas Corpus filed.
" 5, " Argued.
" 12, " Traverse to Return filed.
" 20, " Opinion, Dickinson, J., that Relator be remanded to custody of Respondents filed.
" 20, " Order of Court discharging Writ of Habeas Corpus and remanding Relator to custody *to* Respondents filed.
" 20, " Memorandum Opinion, Dickinson, J., de-

nying motion to admit Relator to bail pending appeal filed.

Apr. 20, 1928 Decree denying motion to admit Relator to bail pending appeal filed.

" 20, " Order of Court granting supersedeas upon entering bail in $1,000 filed.

" 20, " Notice of Appeal and Acknowledgment of service of Notice filed.

" 20, " Assignments of Error filed.

" 20, " Supersedas Bond in $1,000 with surety, acknowledged and filed.

" 20, " Citation allowed and issued.

" 20, " Citation returned: "service accepted" and filed.

" 30, " Praecipe as to transcript of record filed.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed Mar. 26, 1928

To the honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

1. Your petitioner, Thomas W. Cunningham, respectfully represents to your Honorable Court that he is a citizen of the United States and a resident of the City and County of Philadelphia, State of Pennsylvania, within this judicial district.

2. Your petitioner further represents that he is now actually, unjustly and unlawfully imprisoned and restrained of his liberty and detained by the color of the authority of the United States Senate in the custody of David S. Barry, Sergeant at Arms thereof in said district.

3. Your petitioner further represents that the sole claim and authority by virtue of which the said David S. Barry, [fol. 4] Sergeant at Arms as aforesaid, so restrains and detains your petitioner is a warrant for his apprehension, commanding the said David S. Barry to arrest your petitioner and produce him before the United States Senate in

Washington, D. C., by reason of an alleged contempt committed by your petitioner against the said Senate of the United States.

4. Your petitioner is not now and has never been guilty of any contempt against the United States Senate. That the facts upon which said alleged contempt is based are as follows:

That a resolution was passed by the United States Senate, being Resolution 195, a true and correct copy of which is hereto annexed and marked "Exhibit A."

That at the time said Resolution was passed there had been conducted within the State of Pennsylvania a certain primary election in which, inter alia, candidates were nominated for the United States Senate, the final election thereon at the time of the facts hereinafter stated not having taken place. That at the time said primary election took place within the State of Pennsylvania, there were no statutes of said State restricting in any amount the expenditures of the respective candidates in the securing of nominations. That the Constitution of the United States of America, as interpreted by the Supreme Court in the case of Newberry vs. United States, 256 U. S. 232, gave no power to the Congress of the United States or either constituent house thereof to legislate or to regulate in any manner whatsoever the primary election or the manner of conducting the same. That your petitioner is advised, be- [fol. 5] lieves and therefore avers that the said Senate of the United States was without power and authority to pass said Resolution 195 and to compel the citizens of the United States to attend the meeting of the Committee therein and answer questions relating to the said primary election.

5. That notwithstanding the want of power aforesaid in said Senate, your petitioner did attend a meeting of said Committee in the City of Chicago, State of Illinois and did then and there voluntarily inform the Committee that he had contributed the sum of $50,000 to the Republican City Committee of the City of Philadelphia and when the Committee further insisted upon your petitioner disclosing the amount, character, and source of his private estate your petitioner declined and refused so to do, your petitioner specifically reserved to himself the right to refuse to an-

swer questions pertaining to the primary election, but your petitioner at no time declined to answer questions as to the general election.

6. That by reason of petitioner's refusal to disclose his private and individual affairs, the said Senate of the United States improperly, illegally and without any warrant or authority, under the Constitution of the United States or otherwise, has adjudged your petitioner to be in contempt and has issued its warrant to the said David S. Barry to apprehend your petitioner under and by virtue of which your petitioner is now in illegal durance.

7. Your petitioner has been advised, believes and therefore avers that the United States Senate in the above proceedings has attempted an inquisitorial excursion into the [fol. 6] private affairs of a citizen of the United States, to wit, your petitioner, concerning the subject matter which the Constitution of the United States forbids the said Senate to regulate and that if said arrest for contempt is permitted, the Constitution of the United States will be violated and the individual liberty of your petitioner illegally destroyed.

Wherefore your petitioner prays your Honorable Court that a writ of habeas corpus may issue, directed to the said David S. Barry, Sergeant at Arms aforesaid, and to each and all of his deputies, requiring him and them to bring and have your petitioner, together with a true cause of the detention of your petitioner before this Court at the time to be by this Court determined to the end that due inquiry may be had in the premises, and that the Court may proceed to determine the facts of this case in that regard and the legality of your petitioner's imprisonment, restraint and detention and thereupon to dispose of your petition as law and justice may require.

And your petitioner will ever pray, etc.

Thomas W. Cunningham.

Duly sworn to by Thomas W. Cunningham. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO PETITION

69th Congress, 1st Session

S. Res. 195

In the Senate of the United States April 5 (Calendar Day, April 8) 1926

Mr. Reed of Missouri submitted the following resolution, which was ordered to lie on the table May 17 (calendar day May 19) 1926 Considered and agreed to.

Resolution

Resolved, That a special committee of five, consisting of three members selected from the majority *of* political party, of whom one shall be a progressive Republican, and of two members from the minority political party, shall be forth-[fol. 8] with appointed by the President of the Senate; and said committee is hereby authorized and instructed immediately to investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926. Said Committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto.

Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary, to require by subpœna or otherwise the

attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee wilfully makes default, or who, having appeared [fol. 9] refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States.

Said committee shall promptly report to the Senate the facts by it ascertained.

In United States District Court

Order Allowing Writ, etc.—Filed Mar. 26, 1928

Before Dickinson, J.

Writ allowed.

Returnable forthwith. Hearing fixed for April 5, 1928. Bail $1,000.

By the Court. Attest: (S.) Leo A. Lilly, Deputy Clerk.

In United States District Court

Writ of Habeas Corpus

United States,
Eastern District of Pennsylvania, set:

The President of the United States to David S. Barry, Sergeant-at-Arms of the United States Senate, and John J. McGrain, Deputy Sergeant-at-Arms, Greeting:

We command you, that the body of Thomas W. Cunningham in prison, under your custody, as it is said, detained by whatsoever names the said Thomas W. Cunningham [fol. 10] may be detained, together with the day and cause of being taken and detained, you have before the Honorable

O. B. Dickinson, Judge of the District Court of the United States in and for the Eastern District of Pennsylvania, at the Room of the District Court of the United States, in the City of Philadelphia, immediately, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then there this writ.

Witness the Honorable the Judges of said Court at Philadelphia, this 26th day of March, A. D. 1928, and in the 153rd year of the Independence of the said United States.

George Brodbeck, Clerk U. S. District Court, Eastern District of Pennsylvania. (Seal.)

(Writ of Habeas Corpus endorsed:) Habeas corpus. Returnable forthwith and Thursday, April 5th, 1928, at 10 o'clock A. M. fixed for time of hearing. C. C. So Answers W. Frank Mathues, U. S. Marshal, by (S.) Charles P. Mallon, Deputy Marshal. Benjamin M. Golder, Attorney for the Relator.

[fol. 11] In United States District Court

Consent Order as to Entry of Bond—Filed Mar. 26, 1928

And Now, to wit: March 26th, 1928, it is agreed that the hearing on the writ of Habeas Corpus in the above entitled case be held at Philadelphia before the Judges of the District Court for the Eastern District of Pennsylvania, on Thursday, April 5, 1928, at 10 o'clock in the forenoon, and that in the meanwhile the relator in the said proceedings be released on bond entered in the sum of One thousand Dollars ($1,000).

John J. McGrain, Respondent. Howard Benton Lewis, Acting U. S. Attorney, Phila., Pa. Benjamin M. Golder, Attorney pro Petitioner.

Before Dickinson, J.

And Now, to wit, this 26th day of March, 1928, the above stipulation is approved.

By the Court. Attest: George Brodbeck, Clerk.

[fol. 12] IN UNITED STATES DISTRICT COURT

RETURN OF JOHN J. MCGRAIN, DEPUTY SERGEANT-AT-ARMS OF THE SENATE OF THE UNITED STATES, TO THE WRIT OF HABEAS CORPUS HEREIN—Filed Apr. 5, 1928

Now comes the Respondent, John J. McGrain, a Deputy Sergeant-at-Arms of the Senate of the United States, and shows the Court that in obedience to the Writ of Habeas Corpus issued herein, a copy of which is hereto annexed marked Exhibit A, and made a part hereof, he produced before the Court the body of the Petitioner herein, Thomas W. Cunningham, on the 26th day of March, 1928, and that thereupon an order was made by the Court continuing the further hearing of this cause until the 5th day of April, 1928, at 10:00 o'clock in the forenoon, and admitting the Petitioner to bail, a copy of which order is hereto annexed, marked Exhibit B, and made a part hereof. Respondent, John J. McGrain, for cause why the Petitioner was arrested and detained by him certifies:

That David S. Barry is Sergeant-at-Arms of the Senate of the United States, and that John J. McGrain is Deputy Sergeant-at-Arms of the Senate of the United States.

That the Petitioner was arrested by the Respondent, John J. McGrain in the City of Philadelphia, in the Eastern District of Pennsylvania, on the 26th day of March, 1928, and detained in obedience to a warrant of the United States Senate directed to the said David S. Barry, or his Deputy, and endorsed by the said Barry to the Respondent McGrain to serve and return, a copy of which warrant is hereto annexed, marked Exhibit C, and made a part hereof.

[fol. 13] That the warrant above mentioned was issued pursuant to resolution No. 179 of the United States Senate, Seventieth Congress, First Session, a copy of which is hereto annexed, marked Exhibit D, and made a part hereof, which resolution was made pursuant to Senate Committee Report No. 663, Seventieth Congress, First Session, a copy of which is hereto annexed, marked Exhibit E, and made a part hereof, and in connection with an inquiry under Senate resolutions below named, and hereto annexed as exhibits, marked as below indicated, and made a part hereof:

S. Res. 195, 69th Cong. 1st Sess. . .	Exhibit F
S. Res. 227, 69th Cong. 1st Sess	Exhibit G
S. Res. 258, 69th Cong. 1st Sess	Exhibit H
S. Res. 324, 69th Cong. 2nd Sess	Exhibit I
S. Res. 1, 70th Cong. 1st Sess . .	Exhibit J
S. Res. 2, 70th Cong. 1st Sess . .	Exhibit K
S. Res. 10, 70th Cong. 1st Sess	Exhibit L
S. Res. 68, 70th Cong. 1st Sess . .	Exhibit M

The Respondent, further answering said Petition, denies that the Senate of the United States has adjudged the said Petitioner to be in contempt, and avers that the resolution pursuant to which the warrant was issued upon which the Respondent took into custody the body of the Petitioner, is that described in Senate Resolution S. 179, Seventieth Congress, First Session, which required him

"to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere, as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate through its said Committee or the President of the Senate may propound, and to keep the said [fol. 14] Thomas W. Cunningham in custody to await the further order of the Senate."

Wherefore Respondent, John J. McGrain, prays that the Writ of Habeas Corpus be discharged and that the petition be dismissed, and that the Petitioner be remanded to the custody of the said Respondent or David S. Barry under the warrant above mentioned.

John J. McGrain, Deputy Sergeant-at-Arms of the Senate of the United States, Respondent. Geo. W. Wickersham, Counsel for Respondent. Howard Benton Lewis, Acting United States Attorney in and for the Eastern District of Pennsylvania.

Duly sworn to by John J. McGrain. Jurat omitted in printing.

[fol. 15] EXHIBIT "A" TO RETURN

Writ of Habeas Corpus

(See page 11)

EXHIBIT "B" TO RETURN

Consent Order

(See page 13)

EXHIBIT "C" TO RETURN

United States Senate, Washington, D. C.

March 24, 1928

To David S. Barry, Sergeant-at-Arms, United States Senate:

The undersigned, presiding officer of the Senate, by virtue of the power vested in me, hereby command you in pursuance of the order of the Senate, this day made, to forthwith arrest and take into custody and bring to the bar of the Senate Thomas W. Cunningham.

Hereof fail not and make due return of this warrant.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of the United States Senate, this 24th day of March, 1928.

(Signed) Charles G. Dawes, Presiding Officer. (Seal of the United States.

Attest: (Signed) Edwin P. Thayer, Secretary.

Washington, D. C., Mar. 26, 1928.

I made service of the within warrant through my Dep'ty John J. McGrain by personally serving the within-named [fol. 16] Thomas W. Cunningham, at the office of the U. S. Marshal, Federal Bldg., Philadelphia, Pa., at 12.05 o'clock p. m., on the 26th day of March, 1928.

(Signed) David S. Barry, Sergeant-at-Arms, Senate of the U. S.

Senate of the United States, Office of the Sergeant-at-Arms

I do appoint and hereby empower John J. McGrain to serve this subpœna, and to exercise all the authority in relation thereto with which I am vested by the within order.

(Signed) David S. Barry, Sergeant-at-Arms, Senate of the United Sttes.

EXHIBIT "D" TO RETURN

S. Res. 179, 70th Cong., 1st Sess., Adopted March 24, 1928 (69 Cong. Rec., Temp. Ed. 5489)

Whereas it appears from the report of the Special Committee Investigating Expenditures in Senatorial Primary and General Elections that a witness, Thomas W. Cunningham, twice called before the Committee making inquiry as directed by the Senate under Senate Resolution 195 of the Sixty-ninth Congress, declined to answer certain questions relative and pertinent to the matter then under inquiry:

Resolved, that the President of the Senate issue his warrant commanding the Sergeant-at-Arms or his deputy to take into custody the body of said Thomas W. Cunningham [fol. 17] wherever found, and to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate.

EXHIBIT "E" TO RETURN

70th Congress, 1st Session. Senate. Report No. 663

Senatorial Campaign Expenditures

March 22, 1928—Ordered to be Printed

Mr. King, from the Special Committee Investigating Expenditures in Senatorial Primary and General Elections, submitted the following special report:

(Pursuant to S. Res. 195, 227, 258 and 324 of the Sixty-ninth Congress, and also S. Res. 10 of the Seventieth Congress, first session.)

On the 17th day of May, 1926, the Senate of the United States passed the following resolution:

Resolved, That a special committee of five, consisting of three members selected from the majority political party, of whom one shall be a progressive Republican, and of two [fol. 18] members from the minority political party, shall be forthwith appointed by the President of the Senate; and said committee is hereby authorized and instructed immediately to investigate what moneys, emoluments, rewards, or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made, or expended, or shall hereafter be promised, contributed, expended, or made by any person, firm, corporation, or committee, organization, or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the general election to be held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the method of performance of said agreements, together with all facts in relation thereto.

Said committee is hereby empowered to sit and act at such time or times and at such place or places as it may deem necessary; to require by subpœna or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.

The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the

investigation heretofore authorized, shall be held to the [fol. 19] penalties provided by section 102 of the Revised Statutes of the United States.

Said committee shall promptly report to the Senate the facts by it ascertained.

Thereafter the following committee was appointed under the above resolution, to wit: James A. Reed, chairman; Charles L. McNary, Guy D. Goff, William H. King, Robert M. La Follette, Jr.

On the 12th day of December, 1927, the Senate of the United States agreed to the following resolution:

Resolved, That a resolution of the United States Senate agreed to on May 19, 1926, numbered Senate Resolution 195 of the Sixty-ninth Congress, first session, creating a special committee to investigate expenditures in senatorial primary and general elections, and all subsequent resolutions dealing with the said special committee and agreed to by the United States Senate during the Sixty-ninth Congress, to wit: Senate Resolution 227, Senate Resolution 258, and Senate Resolution 324, have continued in full force and operation since the dates of their respective enactment by the Senate, and do now, as then, express the will of this body.

And that the said special committee appointed pursuant to said Senate Resolution 195 of the Sixty-ninth Congress, first session, shall continue to execute the directions of the said several resolutions relating to the said committee until the Senate accepts or rejects the final report of the said special committee or otherwise orders.

Pursuant to said resolutions your committee within the limits of its authority sought to make the investigation called for therein and accordingly called before it various witnesses who were examined touching the matters and [fol. 20] questions pertinent to said investigation. Among the persons appearing before your committee was one Thomas W. Cunningham. Mr. Cunningham who was clerk of the court of quarter sessions of Philadelphia, and treasurer of the State Republican committee, claims to have contributed $50,000 to the Vare campaign fund. A subpœna was issued for his appearance early in June. A diligent

search failed to locate him. Finally, Representative Golder, of the fourth district of Pennsylvania, communicated with the committee, stating that Cunningham would accept service. His whereabouts was disclosed and he was served. He appeared before your committee in its session in the Federal Building in the City of Chicago on July 29, 1926. With him appeared Representative Benjamin M. Golder, who stated that Mr. Cunningham had requested that he be permitted to attend as his attorney. Mr. Cunningham, both for himself and through his attorney, protested the jurisdiction of your committee and refused to answer questions put to him and denied the committee any information beyond the following facts of his name, residence, and occupation as clerk of the quarter sessions court; that he contributed $25,000 to the Vare campaign fund through Thomas F. Watson on April 10, 1926, and $25,000 on April 13.

The testimony of Mr. Cunningham, given at Chicago on the 29th day of July, 1926, appears in Part 2 of the hearings of said committee on pages 1706 to 1715, inclusive, and is here reproduced in full and made part of this report.

The Chairman: Will Mr. Cunningham please come forward?

(Mr. Cunningham and Mr. Benjamin M. Golder came to the committee table.)

[fol. 21] Mr. Golder: Mr. Chairman, my name is Benjamin M. Golder. I am an attorney of Philadelphia. Mr. Cunningham requested that I be permitted to attend as his attorney.

The Chairman: All right, sir.

TESTIMONY OF THOMAS W. CUNNINGHAM

(The witness was sworn by the chairman.)

The Chairman: Let the record show the appearance of Mr. Golder.

Mr. Golder: Mr. Chairman, in the event that a question is asked which I consider one which Mr. Cunningham should not answer, may I address myself to the Chair or to Mr. Cunningham?

The Chairman: It would be entirely proper for you to address yourself to the Chair and state your objection, the same as you would to a court.

What is your full name, Mr. Cunningham?

Mr. Cunningham: Thomas W. Cunningham.

The Chairman: Where do you reside?

Mr. Cunningham: 2116 Cherry Street, Philadelphia.

The Chairman: How long have you resided in Philadelphia?

Mr. Cunningham: My whole life.

The Chairman: What is your occupation or business?

Mr. Cunningham: Clerk of the quarter sessions court.

The Chairman: With what political organization were you connected during the recent primary in Pennsylvania—the last primary?

Mr. Cunningham: The Republican organization of Philadelphia County.

The Chairman: Who was the chairman of that organization?

Mr. Cunningham: Thomas F. Watson.

The Chairman: And what candidate for the Senate was that organization supporting?

Mr. Cunningham: Congressman Vare—W. S. Vare.

[fol. 22] The Chairman: Did you collect any money for use in that campaign?

Mr. Cunningham: I did not.

The Chairman: Was any money given to you for use in that campaign?

Mr. Cunningham: Not one cent.

The Chairman: I mean to include in money, of course—checks or drafts or anything—

Mr. Cunningham: No checks, no drafts, or anything.

The Chairman: That you got money on?

Mr. Cuningham: No, sir.

The Chairman: Did you handle any money in that campaign?

Mr. Cunningham: I did not.

The Chairman: Did you deliver any money to any person?

Mr. Cunningham: I did.

The Chairman: That is handling money, Mr. Cunningham.

Mr. Cunningham: I did not catch your way of saying that.

The Chairman: Very well. To whom did you give any money?

Mr. Cunningham: I handed money to Thomas F. Watson, $25,000, on the 10th day of April, 1926.

The Chairman: Where did you get that money?

Mr. Cunningham: I got that money out of my own private funds.

The Chairman: How is that?

Mr. Cunningham: Out of my own private funds.

The Chairman: Your own private moneys?

Mr. Cunningham: Yes, sir; my own money; my own money.

The Chairman: How long had it been your own money?

Mr. Golder: Mr. Chairman, may I state an objection at this time?

(tol. 23) The Chairman: You may.

Mr. Golder: I have advised Mr. Cunningham that, in my judgment, this committee has no jurisdiction to inquire into the primary election held in Pennsylvania; that it is only a local matter for the Commonwealth of Pennsylvania; and that in my professional judgment he can answer those questions which he sees fit dealing with the primary election, and that he may refuse to answer those questions which he considers his own personal business. I have further advised Mr. Cunningham that he need not disclose to this committee from what part of his personal estate, or personal fortune, he paid the money to Mr. Watson that he did pay during this last campaign in Pennsylvania.

I thought I would state that as a matter of record so that I would not have to object each time a question was asked.

The Chairman: What was my last question?

(The question was read by the reporter as follows:)

"The Chairman: How long had it been your own money?"

Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business.

The Chairman: Where did you get this $25,000 you say you gave to Mr. Watson?

Mr. Cunningham: I refuse to answer that question. I think that is personal.

The Chairman: Where were you keeping this $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: That is another personal question, Senator. I refuse to answer it.

The Chairman: Did you give this money to Mr. Watson in cash or by check?

Mr. Cunningham: I gave it to him as cash.

The Chairman: Where were you when you gave it to him?

Mr. Cunningham: I took it down to his headquarters at [fol. 24] the Walton Hotel on the 10th day of April.

The Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

Mr. Cunningham: Yes, sir.

The Chairman: Where did you get it from to put in your pocket?

Mr. Cunningham: That is a personal question, and I decline to answer it.

The Chairman: How long had you had this money in your possession?

Mr. Cunningham: That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got, or anything else about it.

The Chairman: How long have you been clerk of the quarter sessions court?

Mr. Cunningham: Twenty-one years the 1st of January, 1926.

The Chairman: What is the salary of that position?

Mr. Cunningham: $8,000 a year.

The Chairman: Was this money which you refer to as the $25,000 that you gave to Watson savings from your salary?

Mr. Cunningham: That is another personal question. I can not answer that.

The Chairman: Unfortunately, a good many questions are personal.

Mr. Cunningham: Yes. I think a man's own money is one of his own personal privileges, and he is not supposed to tell how he got it or how he saved it. I think that is a rather unfair question to ask me, how I got the money, how I saved it, and what I done with it.

The Chairman: I dare say. Is there anything wrong or wicked or crooked about the way you got this money, so that it will embarrass you to answer the question or will subject you to criminal prosecution?

[fol. 25] Mr. Golder: I think that is an unfair question, Senator, and I advise Mr. Cunningham to disregard it.

The Chairman: If you were to answer the questions I have asked you with regard to the sources from which and the way in which this money came to you would it tend to subject you to criminal prosecution or public contempt or obloquy?

Mr. Golder: Senator Reed, I think that question is objectionable in form and the way in which it is put, and I advise Mr. Cunningham not to consider it, or not to answer it.

The Chairman: Do you refuse to answer, Mr. Cunningham?

Mr. Cunningham: Yes; I refuse to answer.

Mr. Golder: You see, Senator, when you ask a question which you know that I have advised Mr. Cunningham not to answer, and put it in such a way as you have, it necessarily implies something which is unsavory, and I think it is an unfair way for you to treat a witness.

The Chairman: Well, now, we have permitted you to sit here as an act of courtesy, but we will not permit any criticism of the committee from you.

Mr. Golder: Senator Reed, you have permitted Mr. Cunningham to have his attorney here, and I assume you will not compel me to advise Mr. Cunningham except as I think best.

The Chairman: You will maintain a respectful and decent attitude or you will not sit at this table very long as anybody's attorney.

Mr. Golder: Senator Reed, I have the utmost respect for the committee and for its membership.

The Chairman: You may make your objections and make them in a proper way.

Mr. Cunningham, is there any other reason than the one you have given, or are there any other reasons than those [fol. 26] you have given, why you refuse to answer the questions that have been put to you touching the sources from which the $25,000 came? Have you any other reasons than those you have given?

Mr. Cunningham: That is all, Senator; just personal reasons.

The Chairman: Very well; that is all I want to cover.

Mr. Cunningham: All right, sir.

The Chairman: Where were you when the subpœna was issued for you from this committee, while it was having its sessions in Washington?

Mr. Cunningham: I went on a vacation on the 19th day of June and did not get back until the 8th day of July.

The Chairman: Where were you during that interval?

Mr. Cunningham: I was on an automobile tour up through the southern coast of New Jersey.

The Chairman: What places did you visit?

Mr. Cunningham: I think that is a private, personal question, Senator. I would not answer it.

The Chairman: Where did you stay nights?

Mr. Cunningham: I think that is another private question, as I have said. What material difference does it make? I am not in the habit of having to tell where I went and what I did; never have in my life, Senator.

The Chairman: You knew that a subpœna had been issued for you, did you not?

Mr. Cunningham: The last three or four days I got in touch with the papers, and I found out that there were subpœnas, according to the newspapers, and I came back to Philadelphia on the 8th day of July.

The Chairman: Did you give any other money than the $25,000 to anybody during this campaign?

Mr. Cunningham: Yes; on the 13th of April I gave Mr. Watson $25,000 more.

[fol. 27] The Chairman: So that you gave Mr. Watson a total of $50,000?

Mr. Cunningham: $50,000; of my own money.

The Chairman: Where did you get the second $25,000 from?

Mr. Cunningham: I refuse to answer that question, Senator.

The Chairman: You refuse to tell the committee anything about where you received this money from?

Mr. Cunningham: Yes; I do.

The Chairman: The sources from which the money was received?

Mr. Cunningham: Yes.

The Chairman: How long had the money been in your possession? You refuse to tell that to the committee?

Mr. Cunningham: I certainly do, because I think that is a personal, private question.

The Chairman: How long had you been saving up or accumulating this $50,000?

Mr. Cunningham: I do not like to object to your questions, Senator, because I think a man's own money—why, I don't want to make it public to the press, to the newspapers in Philadelphia, about my private affairs, how I got this money or how I saved it.

The Chairman: Have you inherited any considerable sums of money?

Mr. Cunningham: Never inherited a dollar in my life.

The Chairman: Have you been speculating in stocks or bonds or upon the board, so that you accumulated the money in that way?

Mr. Golder: I object to that question and advise Mr. Cunningham that he need not answer.

The Chairman: What does the witness say?

Mr. Cunningham: I refuse to answer.

The Chairman: Have you turned in on your tax returns any $50,000 for taxation purposes?

[fol. 28] Mr. Golder: I object to that question, Senator, and advise the witness that he need not answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Have you paid to the State of Pennsylvania, the county in which you live, or the city in which you live, any taxes upon this $50,000?

Mr. Golder: I object to that question, Senator, and advise the witness that he need not answer. As a matter of

fact, there is no taxation in Pennsylvania on any such amount.

Mr. Cunningham: I refuse to answer, Senator.

The Chairman: Have you returned to the Federal Government this $50,000 in any form?

Mr. Golder: I object to that question, Senator, and advised the witness he need not answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Did you collect any money from persons employed either by the city of Philadelphia or by the State of Pennsylvania?

Mr. Cunningham: Not one dollar.

The Chairman: Were any moneys paid to you by any of these persons I have just referred to?

Mr. Cunningham: No, sir.

The Chairman: Do you know of any collection of money from State employees for political purposes?

Mr. Cunningham: I do not, Senator.

The Chairman: Do you know of any contributions by the employees of the city to the Vare campaign?

Mr. Cunningham: I will tell you for information that in the primary election there is never any assessment of any kind. In primary elections we never heard tell of any donations from employees.

The Chairman: In the primaries?

Mr. Cunningham: In the primary elections.

[fol. 29] The Chairman: Do you know Martin Powers?

Mr. Cunningham: Yes, sir.

The Chairman: Did you spend any of this vacation at his home in New Jersey?

Mr. Cunningham: How is that?

The Chairman: Did you spend any part of your vacation in company with Mr. Martin Powers?

Mr. Golder: Mr. Chairman, I object to that question. The witness has already testified that he declines to state where and with whom he spent his vacation.

The Chairman: I did not ask him with whom he spent it until just now.

Mr. Golder: I advise the witness that he need not answer that question.

Mr. Cunningham: I refuse to answer the question, Senator.

The Chairman: Did you leave the city of Philadelphia with Mr. Powers?

Mr. Golder: I advise the witness that he need not answer that question, Senator.

Mr. Cunningham: I did not.

The Chairman: Did you leave the city of Philadelphia in an automobile?

Mr. Golder: I advise the witness that he need not answer that question, Senator, it being entirely immaterial and a personal matter.

Mr. Cunningham: I refuse to answer.

The Chairman: Whose car did you leave in?

Mr. Golder: I advise the witness that he need not answer that question.

Mr. Cunningham: I refuse to answer, Senator.

The Chairman: You say you know Mr. Powers. What is his business?

Mr. Cunningham: I have known Mr. Powers from boyhood. He is a member of the bar, an attorney at law.

The Chairman: Is he connected with a trust company in Philadelphia.

[fol. 30] Mr. Cunningham: I do not know.

The Chairman: Did Mr. Powers formerly have a partner who is now president of a trust company?

Mr. Golder: I advise the witness that he need not answer that question.

The Chairman: Oh, well, now, that is getting to be sheer insolence, to advise a witness not to answer a question of that kind. It could not possibly harm this witness.

Mr. Golder: Perhaps not, Senator; but it might lead to other things. I think we ought to draw the line of advising the witness what he may answer and what he should not answer.

Mr. Cunningham: I do not know anything at all about that, Senator.

The Chairman: If you came here to tell this witness that he should not answer any question, whether it is pertinent or not, you are abusing the courtesy of the committee extended to you, whether it is a thing that could possibly affect his own honor or his own private business.

Mr. Golder: Senator, I do not agree with you; and I am sorry to disagree with you.

The Chairman: Well I am sorry you do.

Mr. Golder: But I must use my own judgment.

The Chairman: You may use it as long as we permit you to sit here; but if you abuse the privilege, you will not sit here.

Mr. Golder: I do not intend to abuse it, Senator.

The Chairman: Well, you are abusing it. Did Powers formerly have a partner whose name began with "Mac"?

Mr. Cunningham: I do not know the first thing about it, Senator. I do not know anything at all about Powers's private business whatever.

The Chairman: Did you have in your possession, of your own money, 30 days before you say you gave this money to Watson, as much as $1,000?

[fol. 31] Mr. Cunningham: As much as $1,000?

The Chairman: Yes.

Mr. Cunningham: Oh, yes, sir.

The Chairman: What bank do you bank in?

Mr. Golder: Mr. Chairman, I object to that question, and advise the witness that he need not answer.

The Chairman: What is the answer of the witness?

Mr. Cunningham: I refuse to answer.

The Chairman: Have you ever had a bank account anywhere?

Mr. Cunningham: Sure.

The Chairman: Where?

Mr. Cunningham: I have a bank account for my office.

The Chairman: A bank account in your office?

Mr. Cunningham: I say I have to run my office, and therefore I have to use a bank account for the proceeds of my office.

The Chairman: Is that your personal account?

Mr. Cunningham: One of them is; yes.

The Chairman: What bank is it in?

Mr. Golder: Senator, I object to that question and advise the witness he need not answer where he deposits his money, it being entirely a private matter.

Mr. Cunningham: I refuse to answer.

The Chairman: I do not intend to get into an argument with you, Mr. Golder. You know perfectly well that when

a man states that he had $50,000, and it was his own money, and assuming, now, that this committee has any jurisdiction—which I understand you challenge, and which you have a right to challenge—we have the right to test the reasonableness of that story. We are not concluded by the bald statement that it was the witness's own money; and so we have the right to know, assuming that we have any [fol. 32] right at all to conduct this investigation, the source from which this money came, in order that we may ascertain whether, as a matter of fact, the witness did have it. So, with that explanation, I am asking the witness where he kept his bank account?

Mr. Golder: Senator, may I be permitted to state our position?

The Chairman: You have stated it, I think.

Mr. Golder: May I repeat it, then, in answer to what you have just said?

My position is that this committee had no right, in the first place, to inquire whether this witness contributed anything to the Pennsylvania primary. If the witness saw fit to state that he did, that does not waive any right that he may have to refuse to answer any other question connected or disconnected with the $50,000. I do not think this committee had any right to inquire into the $50,000 initially.

The Chairman: And of course, you think that your opinion is the final word as to the law?

Mr. Golder: It will be with Mr. Cunningham, at least, at this time.

The Chairman: We will ascertain whether that is true or not a little later. How long have you known Congressman Vare?

Mr. Cunningham: Ever since I have been a boy—35 or 40 years, I guess.

The Chairman: Were you in any way connected with his campaign committee, the committee which was conducting his campaign in the last primary?

Mr. Cunningham: Only in one way; I was for him after he concluded to be a candidate for United States Senator.

The Chairman: Did you ever talk with him?

Mr. Cunningham: I talked with him on several occasions about it.

The Chairman: With him during the campaign?

Mr. Cunningham: No, sir. This was prior to the cam-
[fol. 33] paign, before he came out as a candidate.

The Chairman: Did you urge him to come out?

Mr. Cunningham: No; I rather urged the other way, Senator.

The Chairman: When he did come out, you became one of his supporters?

Mr. Cunningham: Because our organization, as a rule—if the majority make up their mind to be for a candidate—the majority made up their minds for William S. Vare, and I went along with the majority.

The Chairman: When you speak of "our organization," what organization do you mean?

Mr. Cunningham: The Republican city committee of Philadelphia. We have 48 wards; 48 members of that committee.

The Chairman: Are you a member?

Mr. Cunningham: A member of that committee; yes, sir.

The Chairman: For which ward?

Mr. Cunningham: The tenth ward.

The Chairman: During the campaign, then, after the organization resolved to support Vare, you gave him your loyal support?

Mr. Cunningham: Yes, sir.

The Chairman: Who asked you to make this contribution of $50,000?

Mr. Cunningham: Nobody asked me, Senator. I will tell you the reason why I made this contribution.

I was a Penrose man to the day he died, in Philadelphia. Eddie Beidleman and Harry Baker have been the same as my two sons, and were very close friends of Penrose's to the day of his death. Beidleman's ambition was to be governor. I was for Beidleman four years ago. George Alder was picked, and he had to step aside. This time I thought that he would make the best governor Pennsylvania ever
[fol. 34] had. I thought he was the most practical man in the State of Pennsylvania, a man who was a member of the legislature, State senator for four years, lieutenant governor four years, and a real man, and I thought he would make the best governor Pennsylvania ever had, and I was very fond of him. Now, that was my whole interest.

The Chairman: Had you ever made any such contribution as this before out of your own money?

Mr. Cunningham: Never before in my life. I had made small contributions, a hundred or five hundred dollars at different times, to help some poor fellow running for council.

The Chairman: Are you a man of considerable means, Mr. Cunningham?

Mr. Cunningham: Well, pretty fairly at the present time.

The Chairman: Did you draw this money out of any bank?

Mr. Cunningham: No, sir.

The Chairman: How long had you had it in your pocket?

Mr. Golder: Mr. Senator, I think we have had that question up before, and I advised him not to answer.

Mr. Cunningham: I think I answered that before.

The Chairman: I thought you might change your mind.

Mr. Cunningham: No. You are so nice about it, anybody would change their mind if he felt inclined to change it, Senator.

The Chairman: I desire to be nice to everybody.

Mr. Cunningham: I know it; I have seen that since I have been here, the last four days.

The Chairman: You are the only man who has come here who has been unwilling to tell where he got his money.

Mr. Cunningham: Well, Senator, I am an American citi- [fol. 35] zen. I was born in the greatest American city today in the United States, Philadelphia, and I have never been used to telling people where I went or what I done or how I made my money, and I am too old now to change my thought of mind.

The Chairman: You just formed the habit of independence?

Mr. Cunningham: I formed that habit through my late friend, Senator Penrose. I guess I learned that trick from him—saving money and putting it away and keeping it under cover. I have been with him, and I was his friend to the day he died.

The Chairman: You say you learned this habit of putting it away from Penrose?

Mr. Cunningham: Yes, sir. He was a past master in not letting his right hand know what his left hand done, and

he dealt absolutely in cash. The "long green" was the issue.

The Chairman: Is there any danger involved in your right hand knowing what your left hand does?

Mr. Cunningham: Well, I never let it be known.

The Chairman: You do not even want to know, yourself?

Mr. Cunningham: Sometimes I really do not.

The Chairman: And that is one of the attributes of independence in Pennsylvania, is it?

Mr. Cunningham: Yes, sir.

The Chairman: That your right hand shall not know what your left hand does?

Mr. Cunningham: Yes, sir. If a great many people would do that, there would not be so much trouble in Chicago and other big cities.

The Chairman: That is, you mean by that, I think, Mr. Cunningham, that if you do a thing secretly enough, so that nobody ever finds out about it, you never have any trouble about it?

[fol. 36] Mr. Cunningham: So long as you do it honestly it is all right, Senator.

The Chairman: And if you are doing it honestly all the more reason for secrecy, I presume?

Mr. Golder: Senator, are you not really arguing with the witness?

The Chairman: I am trying to get the witness's mental slant on this. Mr. Cunningham, I want to be perfectly frank with you. It will be the duty of the committee to report you to the United States Senate for contempt. That is not a threat; we are not making threats. That is the fact. Then, of course, it will have to be determined whether you have to answer these questions. What the result may be will have to be determined by the Senate and possibly by the courts. I think it is only fair to make that statement to you, and having made it, I ask you if you adhere to the position you have taken in your various refusals to answer?

Mr. Golder: Senator, your voice dropped near the end; I do not think Mr. Cunningham heard all that you said.

The Chairman: The stenographer will read my statement.

(The reporter read as follows:)

"Mr. Cunningham, I want to be perfectly frank with you. It will be the duty of the committee to report you to the United States Senate for contempt. That is not a threat; we are not making threats. That is the fact. Then, of course, it will have to be determined whether you have to answer these questions. What the result may be will have to be determined by the Senate and possibly by the courts. I think it is only fair to make that statement to you, and having made it, I ask you if you adhere to the position you have taken in your various refusals to answer?"

Mr. Cunningham: I do, Senator.

[fol. 37] The Chairman: Very well; that is all, sir.

* * * * * * *

That thereafter (to wit, on Monday, February 21, 1927) your committee met in Washington and continued its hearings. That said Thomas W. Cunningham was recalled to testify before your committee and appeared in person and with his attorney, Mr. Benjamin W. Golder, when the following proceedings were had as shown in Part 6 of the hearings before the committee, pages 3280, 3291, 3292, and 3293:

TESTIMONY OF THOMAS W. CUNNINGHAM—Resumed

Mr. Golder: I represent Mr. Cunningham, and he has asked me to sit with him and advise him.

The Chairman: You will be permitted to sit here, in the capacity of an attorney, but the committee will conduct the examination.

(The witness was sworn by the chairman.)

Mr. Golder: Mr. Chairman, if any questions are asked which I consider Mr. Cunningham should not answer, should I address myself to the Chair?

The Chairman: Yes. Your full name is?

Mr. Cunningham: Thomas W. Cunningham.

The Chairman: You are the same Thomas W. Cunningham who appeared before this committee?

Mr. Cunningham. I am.

The Chairman: And gave certain testimony, and refused to answer certain questions at the previous hearing?

Mr. Cunningham: Yes, sir.

The Chairman: Mr. Cunningham, the committee has called you before it the second time in order to permit you an opportunity to answer the questions you declined to answer before, and afford you the opportunity to answer such other questions as may be put to you.

Mr. Cunningham, on your previous examination you stated (reading):

[fol. 38] "I handed money to Thomas F. Watson $25,000 on the 10th day of April, 1926."

Then this follows, as shown by the record of the proceedings (reading):

"The Chairman: Where did you get that money?

"Mr. Cunningham: I got that money out of my own private funds.

"The Chairman: How is that?

"Mr. Cunningham: Out of my own private funds.

"The Chairman: Your own private moneys?

"Mr. Cunningham: Yes, sir; my own money; my own money.

"The Chairman: How long had it been your own money?"

Mr. Golder at that time stated an objection, which appears in the record. The question was repeated, as follows (reading):

"The Chairman: How long had it been your own money?

"Mr. Cunningham: I refuse to answer that question, Senator, as a personal question. It is my own private business."

I now ask you that same question again, Mr. Cunningham.

Mr. Cunningham: Same answer.

The Chairman: On behalf of the committee, I instruct you to answer the question.

Mr. Cunningham: I refuse to answer, Senator.

The Chairman: Very well. The next question which was asked you was as follows (continuing reading):

"The Chairman: Where did you get this $25,000 you say you gave to Mr. Watson?

"Mr. Cunningham: I refuse to answer that question. I think that is personal."

I now ask you, on behalf of the committee, the same question, and await your answer.

Mr. Cunningham: I refuse to answer.

[fol. 39] The Chairman: On behalf of the committee, I instruct you to answer.

Mr. Golder: Mr. Chairman, may I—

The Chairman: No; you may not. This man is getting along all right.

Mr. Cunningham: I refuse to answer, Senator.

The Chairman: Now, you may make any suggestion you want to.

Mr. Golder: Too late now, Senator.

The Chairman: I do not intend that you shall suggest the answers to a witness while I am examining him. You may make any objection you want to.

Mr. Golder: I addressed myself to the Chair, Mr. Chairman.

The Chairman: I want to extend every courtesy and every right.

Mr. Golder: You usually do, Senator. I do not think you understood me.

The Chairman: The next question that was asked you was as follows (continuing reading):

"The Chairman: Where were you keeping this $25,000 before you gave it to Mr. Watson?

"Mr. Cunningham: That is another personal question, Senator. I refuse to answer it."

I now ask you the same question, that is, where were you keeping this $25,000 before you gave it to Mr. Watson?

Mr. Cunningham: I refuse to answer.

The Chairman: Again I instruct you, on behalf of the committee, to answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Very well. You were asked a number of questions, which I will read for the context (continuing reading):

"The Chairman: Did you give this money to Mr. Watson in cash or by check?

"Mr. Cunningham: I gave it to him as cash.

"The Chairman: Where were you when you gave it to him?

[fol. 40] "Mr. Cunningham: I took it down to his headquarters at the Walton Hotel on the 10th day of April.

"Mr. Chairman: Did you have it in your pocket when you gave it to him—before you gave it to him?

"Mr. Cunningham: Yes, sir.

"The Chairman: Where did you get it from to put in your pocket?

"Mr. Cunningham: That is a personal question, and I decline to answer it."

I now ask you again, where did you get it? That is, where did you get this money from to put in your pocket?

Mr. Cunningham: I refuse to answer.

The Chairman: And I direct you, on behalf of the committee, to answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Very well. The next question asked you was (continuing reading):

"The Chairman: Mr. Cunningham, how long had you had this money in your possession?

"Mr. Cunningham: That is another personal question, and I decline to answer it. It was my own money, and I do not think I should tell the public where I kept it and how I got it, or anything else about it."

I now ask you, how long had you had this money in your possession?

Mr. Cunningham: I refuse to answer.

The Chairman: Again I instruct you to answer.

Mr. Cunningham: I refuse to answer.

The Chairman: You were then asked questions touching your salary, and after that, this question (reading):

"The Chairman: Was this money which you refer to as the $25,000 that you gave to Watson, savings from your salary?

"Mr. Cunningham: That is another personal question. I can not answer that."

[fol. 41] I now ask you again, was this $25,000 which you refer to as the $25,000 that you gave to Watson, savings from your salary?

Mr. Cunningham: I refuse to answer.

The Chairman: And I instruct you, on behalf of the committee, to answer.

Mr. Cunningham: I refuse to answer.

The Chairman: Now, Mr. Cunningham, you recall the testimony you gave before, I take it fairly well?

Mr. Cunningham: I think I do, Senator.

The Chairman: We have called you here for the purpose of giving you an opportunity to purge yourself of what was regarded as contempt of the committee and of the Senate. Do you still stand upon your refusal to answer the questions which were asked you on the previous hearing?

Mr. Cunningham: I do sir.

The Chairman: You have nothing to say further as to your reasons for refusing to answer than you stated before?

Mr. Cunningham: I have not.

The Chairman: Mr. Cunningham, I think you will have to agree that at least the committee has given you every opportunity to make an explanation. If you do not desire to make it, of course, you have the right.

Mr. Cunningham: The only thing I was interested in, as I told you before, Senator, was Beidleman, and not any other project. If he had not been on the ticket I would not have given it.

The Chairman: Do you know whether it was reported in Mr. Beidleman's campaign expenses?

Mr. Cunningham: I really do not know that. I instructed Mr. Watson what my thought was about it, because he had been a friend of mine for forty odd years, and that was my only interest in it.

The Chairman: You are excused from further attendance on the committee, sir.

[fol. 42] That on the 22d day of December, 1926, your committee submitted a partial report, being Report 1197, Part 2; and on pages 22 to 29, inclusive, will be found the testimony given by said Cunningham on the said 29th day of July, 1926; that by said report the attention of the Senate was directed to the refusal of said Cunningham to answer various questions propounded by said committee; that on the 12th day of February, 1927, another partial report was submitted by your committee, being Report 1197, Part 4, which sets forth the proceedings before your committee on the 29th day of July, 1926, in so far as it relates to the testimony of the said Cunningham; that said report contains the following statement with reference to said Cunningham:

Thomas W. Cunningham appeared before your committee in Chicago, Ill., on July 29, 1926, having been previously sworn.

The testimony of the witness Cunningham speaks for itself. Every opportunity was given the witness Cunningham to testify, and, as his testimony fully discloses, he steadfastly and obdurately refused to give your committee any information.

Your committee therefore reports the conduct of Thomas W. Cunningham to the Senate. • • •

Wherefore, your committee reports the facts as aforesaid to the Senate for such further action as the Senate may deem meet and proper.

That on the 28th day of February, 1927, your committee submitted a further partial report, being Report 1197, Part 5, which deals among other things with the conduct of the said Thomas W. Cunningham in refusing to answer questions propounded by your committee as hereinbefore set [fol. 43] forth. That part of the report dealing with the said Thomas W. Cunningham is found on pages 43, 44, 45 and 46.

Your committee in said last-named report made the following statement and recommendations concerning said

Thomas W. Cunningham, as shown by said report on page 53:

The witness, Cunningham, refused to amplify his testimony in any particular, stood on his previous refusals to answer the interrogatories propounded to him, and defied the jurisdiction of your committee.

Your committee therefore reports the defiant and contumacious conduct of the said witness, Thomas W. Cunningham, and recommends that he be adjudged in contempt of your committee and of the Senate of the United States.

That said last-named report was submitted to the Senate in the closing hours of its session and at a time and under conditions which prevented its consideration by the Senate, as a result of which no action was taken upon the recommendation made by your committee. Your committee herewith submits its final report in so far as said witness, Thomas W. Cunningham, is concerned and calls the attention of the Senate to the defiant and contumacious conduct of said witness, Thomas W. Cunningham, and renews the recommendation made in its report of February 28, 1927, that the said Thomas W. Cunningham be adjudged in contempt of your committee and of the Senate of the United States.

All of the acts of your committee and all of the testimony by it taken and all of the reports submitted by your committee are disclosed by printed records of the hearings and are hereby referred to and made a part of this report as [fol. 44] fully as those set forth herein. Said records and reports disclose all questions which were propounded to said witness, Thomas W. Cunningham, together with his replies thereto and all proceedings had in connection with said Thomas W. Cunningham.

EXHIBIT "F" TO RETURN

Senate Resolution 195, 69th Congress

(See Exhibit "A" to Petition for Writ of Habeas Corpus, Page 8)

EXHIBIT G TO RETURN

S. Res. 227, 69th Cong., 1st Sess., Adopted June 3, 1926 (67 Cong. Rec. 10564)

Resolved, That the special Senate committee created pursuant to Resolution 195, agreed to the 19th day of May, 1926, hereby is authorized to employ stenographic assistance, at a cost not exceeding 25 cents per hundred words, to report such hearings and proceedings as may be had in connection with any subject which may be before said committee and such clerical or other assistance as may be deemed necessary by the committee, that all expenses incurred, including costs of travel by the committee or their assistants, in furtherance of the purposes of said resolution, shall be paid out of the contingent fund of the Senate upon vouchers properly approved. The costs of this investigation shall not exceed $10,000.

[fol. 45] EXHIBIT H TO RETURN

S. Res. 258, 69th Cong., 1st Sess., Adopted June 30, 1926 (67 Cong. Rec. 12308)

Resolved, That Senate Resolution No. 227 agreed to June 3, 1926, be, and hereby is, amended to increase the cost of the investigations, payment for which is therein provided, from $10,000 to $50,000.

EXHIBIT I TO RETURN

S. Res. 324, 69th Cong., 2nd Sess., Adopted January 11, 1927 (68 Cong. Rec. 1413)

Whereas William B. Wilson, of the State of Pennsylvania, has presented his petition to the Senate of the United States contesting the election of William S. Vare as a Senator from Pennsylvania in the election held on the 2nd day of November, 1926; and

Whereas the said William B. Wilson charges in his petition fraudulent and unlawful practices in connection with the nomination and in connection with the alleged election of the said Vare as Senator from the State of Pennsylvania; and that unless preserved for the use of the Senate certain evidence relating to said charges and said election will be lost or destroyed; and

Whereas the special committee of five organized under Senate Resolution No. 195, Sixty-ninth Congress, first session, by direction of the Senate has entered upon an investigation pertaining to alleged corrupt practices in the election held November 2, 1926, and in the primary preceding it in the State of Pennsylvania: Therefore be it

Resolved, That the special committee of five constituted under Senate Resolution No. 195, Sixty-ninth Congress, first session, in addition to and not in detraction from the [fol. 46] powers conferred in said resolution, be, and it is hereby, authorized and empowered—

(1) To take possession, in the presence of the said William S. Vare or his representative, if the said William S. Vare desires to be present or to have a representative present, and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists, and other records, books, and documents used in said senatorial election held in the State of Pennsylvania on the 2d day of November, 1926.

(2) To take and preserve all evidence as to the various matters alleged in said petition, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters, or other acts or facts affecting the result of said election.

(3) That said committee is hereby vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution No. 195, Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

(4) That the Sergeant-at-Arms of the Senate and his deputies are directed to attend the said special committee and to execute its directions. That the said special committee may appoint sub-committees of one or more mem-

bers with power and authority to act for the full committee in taking possession of evidence and in the subpœnaing of witnesses and taking testimony.

Resolved further, That the expenses incurred in carrying out this resolution shall be paid from the contingent fund of the Senate upon vouchers ordered by the committee or any sub-committee thereof and approved by the chairman of the committee, the cost of same not to exceed $15,000 in addition to the moneys heretofore authorized to be expended.

[fol. 47] EXHIBIT J TO RETURN

S. Res. 1, 70th Cong., 1st Sess., Adopted December 7, 1927
(69 Cong. Rec., Temp Ed. 160)

Whereas on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate, and the employment of certain other corrupt and unlawful means to secure such nomination or election.

Whereas said committee in the discharge of its duties notified Frank L. Smith, of Illinois, then a candidate for the United States Senate from that State, of its proceeding, and the said Frank L. Smith appeared in person and was permitted to counsel with and be represented by his attorneys and agents.

Whereas the said committee has reported—

That the evidence without substantial dispute shows that there was expended directly or indirectly for and on behalf of the candidacy of the said Frank L. Smith for the United States Senate the sum of $458,782; that all of the above sum except $171,500 was contributed directly to and received by the personal agent and representative of the said Frank L. Smith with his full knowledge and consent; and that of the total sum aforesaid there was contributed by officers of large public-service institutions doing business in the State of Illinois or by said institutions the sum of $203,000, a substantial part of which sum was contrib-

uted by men who were nonresidents of Illinois, but who were officers of Illinois public-service corporations.

That at all of the times aforesaid the said Frank L. Smith was chairman of the Illinois Commerce Commission, and that said public-service corporations commonly and [fol. 48] generally had business before said commission, and said commission was, among other things, empowered to regulate the rates, charges, and business of said corporations.

That by the statutes of Illinois it is made a misdemeanor for any officer or agent of such public-service corporations to contribute any money to any member of said commission, or for any member of said commission to accept such moneys upon penalty of removal from office.

That said Smith has in no manner controverted the truth of the foregoing facts, although full and complete opportunity was given to him, not only to present evidence but arguments in his behalf; and

Whereas the said official report of said committee and the sworn evidence is now and for many months has been on file with the Senate, and all of the said facts appear without substantial dispute: Now, therefore, be it

Resolved, That the acceptance and expenditure of the various sums of money aforesaid in behalf of the candidacy of the said Frank L. Smith is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government, and taints with fraud and corruption the credentials for a seat in the Senate presented by the said Frank L. Smith; and be it further

Resolved, That the claim of the said Frank L. Smith to a seat in the United States Senate is hereby referred to the said special committee of the Senate, with instructions to grant such further hearing to the said Frank L. Smith, and to take such further evidence on its own motion as shall be proper in the premises, and to report to the Senate at the earliest possible date; and that until the coming in of [fol. 49] the report of said committee and until the final action of the Senate thereon the said Frank L. Smith be, and he is hereby denied a seat in the United States Senate: Provided, That the said Frank L. Smith shall be accorded

the privileges of the floor of the Senate for the purpose of being heard touching his right to receive the oath of office and to membership in the Senate.

Exhibit K to Return

S. Res. 2, 70th Cong., 1st Sess., Adopted December 9, 1927 (69 Cong. Rec., Temp. Ed., 343)

Whereas on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate, and the employment of certain other corrupt and unlawful means to secure such nomination or election; and

Whereas said committee, in the discharge of its duties, notified William S. Vare, of Pennsylvania, then a candidate for the United States Senate from that State, of its proceeding, and the said William S. Vare appeared in person and by attorney before said committee while it was engaged in making such investigation; and

Whereas the said committee has reported the evidence which without substantial dispute shows that at the primary election at which the said William S. Vare is alleged to have been nominated as a candidate for the United States Senate, there were numerous and various instances of fraud and corruption in behalf of the candidacy of the said William S. Vare, and that there was spent in behalf of the said [fol. 50] William S. Vare in said primary election, by the said William S. Vare and his friends a sum of money exceeding $785,000; and

Whereas the said William S. Vare has in no manner controverted the truth of the foregoing facts, although full and complete opportunity was given him, not only to present evidence but arguments in his behalf; and

Whereas the said official report of said committee and the sworn evidence taken by said committee is now and for many months has been on file in the Senate, and all of the said facts appear without substantial dispute; and

Whereas on the 10th day of January, 1927, there was filed in the Senate an official communication from the then

Governor of Pennsylvania, made and delivered to the Senate in pursuance of law, the following certificate:

Governor's Office, Commonwealth of Pennsylvania,
Harrisburg

January 8, 1927.

The President of the Senate of the United States, Washington, D. C.

SIR: I have the honor to transmit herewith the returns of the election of United States Senator, held on November 2, 1926, as the law of this Commonwealth directs.

I have the honor also to inform you that I have to-day signed and by registered mail delivered to Hon. William S. Vare a certificate, which is as follows:

"To the President of the Senate of the United States:

"This is to certify that on the face of the returns filed in the office of the secretary of the Commonwealth of the election held on the 2d day of November, 1926, William S. Vare appears to have been chosen by the qualified electors [fol. 51] of the State of Pennsylvania a Senator from said State to represent said State in the Senate of the United States for the term of six years beginning on the 4th day of March, 1927."

The form of words customarily used for such certificates by the governors of this Commonwealth and the form recommended by the Senate of the United States both include certification that the candidate in question has been "duly chosen by the qualified electors" of the Commonwealth.

I can not so certify, because I do not believe that Mr. Vare has been duly chosen. On the contrary, I am convinced, and have repeatedly declared, that his nomination was partly bought and partly stolen, and that frauds committed in his interest have tainted both the primary and the general election. But even if there had been no fraud in the election, a man who was not honestly nominated can not be honestly entitled to a seat.

The stealing of votes for Mr. Vare, and the amount and the sources of the money spent in his behalf, make it clear

to me that the election returns do not in fact correctly represent the will of the sovereign voters of Pennsylvania.

Therefore, I have so worded the certificate required by law that I can sign it without distorting the truth.

I have the honor to be, sir,

Very respectfully yours, Gifford Pinchot, Governor.

Now, therefore be it

Resolved, That the expenditure of such a large sum of money to secure the nomination of the said William S. Vare as a candidate for the United States Senate prima facie is contrary to sound public policy, harmful to the [fol. 52] dignity and honor of the Senate, dangerous to the perpetuity of a free government, and, together with the charges of corruption and fraud made in the report of said committee, and substantiated by the evidence taken by said committee, and the charges of corruption and fraud officially made by the Governor of Pennsylvania, prima facie taints with fraud and corruption the credentials of the said William S. Vare for a seat in the United States Senate; and be it further

Resolved, That the claim of the said William S. Vare to a seat in the United States Senate is hereby referred to the said special committee of the Senate, with instructions to grant such further hearing to the said William S. Vare and to take such further evidence on its own motion as shall be proper in the premises, and to report to the Senate within 60 days if practicable; and that until the coming in of the report of said committee and until the final action of the Senate thereon the said William S. Vare be, and he is hereby, denied a seat in the United States Senate: Provided, That the said William S. Vare shall be accorded the privileges of the floor of the Senate for the purpose of being heard touching his right to receive the oath of office and to membership in the Senate.

EXHIBIT L TO RETURN

S. Res. 10, 70th Cong., 1st Sess., Adopted December 12, 1927 (69 Cong. Rec., Temp. Ed., 482)

Resolved, That a resolution of the United States Senate, agreed to on May 19, 1926, numbered Senate Resolution

195, of the Sixty-ninth Congress, first session, creating a [fol. 53] special committee to investigate expenditures in senatorial primary and general elections, and all subsequent resolutions dealing with the said special committee and agreed to by the United States Senate, during the Sixty-ninth Congress (to wit, S. Res. 227, S. Res. 258, and S. Res. 324), have continued in full force and operation since the dates of their respective enactment by the Senate, and do now, as then, express the will of this body.

And that the said special committee appointed pursuant to said Senate Resolution 195 of the Sixty-ninth Congress, first session, shall continue to execute the directions of the said several resolutions relating to the said committee until the Senate accepts or rejects the final report of the said special committee or otherwise orders.

Exhibit M to Return

S. Res. 68, 70th Cong., 1st Sess., Adopted December 17, 1927 (69 Cong. Res., Temp. Ed., 781)

Whereas on the 4th day of March, 1927, the Senate referred to the Committee on Privileges and Elections the pending contest between William S. Vare and William B. Wilson, involving the question whether the said Vare or the said Wilson, or either of them, is entitled to membership in the United States Senate as a Senator from the State of Pennsylvania: Now, therefore, be it

Resolved, That the Committee on Privileges and Elections is hereby authorized to hear and determine said contest, and to take such evidence as it may deem proper in order to determine the questions involved, and certify its conclusions to the Senate.

[fol. 54] Said committee is authorized, by itself or by any subcommittee, to investigate the questions aforesaid, and shall have authority to act by or through such agents or representatives as it may see fit to designate.

Said committee, or any subcommittee thereof, shall have power to issue subpœnas and require the production of all papers, books, documents, or other evidence pertinent to said investigation, and said committee, or any subcommit-

tee thereof, may sit during the sessions of the Senate and during any recess of the Senate or of the Congress and to hold its sessions at such places as it may deem proper.

It shall have authority to employ clerks and other necessary assistance and to employ stenographers at a cost not to exceed 25 cents per hundred words, and to force to be taken and recorded all evidence received by the committee, and to have said evidence printed for the information of the Senate.

The Senate, having heretofore created a special committee to inquire into certain matters in connection with said election and the primary preceding the same, and having continued said committee in force, it is ordered that the Committee on Privileges and Elections may, in its discretion, consider such evidence as has heretofore or may hereafter be taken by the said special committee appointed pursuant to Senate Resolutions 195, 223, 258, and 324, Sixty-ninth Congress, and Senate Resolution 10, Seventieth Congress; and the said special committee is hereby authorized, in its discretion, to consider such evidence as may be taken by the said Committee on Privileges and Elections.

The Sergeant at Arms of the Senate and his deputies and assistants are hereby required to attend the said Committee on Privileges and Elections, or of any subcommittee thereof, and to execute its directions.

[fol. 55] The chairman of the committee, and each and every member thereof, is hereby empowered to administer oaths and generally have such powers and perform such duties as are necessary or incident to the exercise of the powers and duties imposed by this resolution.

Said committee shall report to the Senate at the earliest practicable date.

The cost of investigations and proceedings in pursuance of the foregoing to be paid out of a contingent fund of the Senate, and not to exceed $50,000.

In United States District Court

Traverse to Return—Filed Apr. 12, 1928

To the Honorable the Judges of the said Court:

Your relator, Thomas W. Cunningham, in answer to the return of John J. McGrain, Deputy Sergeant-at-Arms of

the United States to the writ of habeas corpus directed to him, respectfully shows:

1. The warrant of the United States Senate returned by John J. McGrain, Deputy Sergeant at Arms of the United States Senate, upon which respondent took into custody the body of the relator, is illegal, void and of no effect for the reasons more fully and at large set forth in the petition for writ of habeas corpus filed by your relator in this Honorable Court, which relator now incorporates in this his traverse to the return of the respondent, as a part hereof, with the same force and effect as if the same were hereunto annexed and set forth in full.

2. The said warrant was issued by the Senate of the [fol. 56] United States pursuant to its resolution 179 passed on the 22nd day of March, 1928, at the first session of the 70th Congress, and commanded its Sergeant-at-Arms to bring relator "before the bar of the Senate * * * and to keep * * * Cunningham in custody to await further order of the Senate." The charge preferred against the relator in said resolution, and therein stated as the cause for the arrest and detention of the relator upon said warrant, is his contumacy as a witness during the 69th Congress, as set forth in the preamble of the said resolution which follows:

"Whereas it appears from the report of the special committee investigating expenditures in senatorial primary and general elections that a witness, Thomas W. Cunningham, twice called before the committee making inquiry as directed by the Senate under S. Res. 195 of the Sixty-ninth Congress, declined to answer certain questions relative and pertinent to the matter then under inquiry;"

3. The said resolution and the warrant issued pursuant thereto are in form and words similar to and in legal effect the same as the resolutions heretofore passed and warrants heretofore issued by the Senate of the United States for the purpose of apprehending and bringing to the bar of the Senate an individual by it adjudged to be in contempt; and are in form and words similar to and in legal effect the same as resolutions by it passed and warrants by it issued in the following cases, wherein the Supreme

Court of the United States, in passing on the validity of the warrant and the legality of the consequent arrest, assumed that the relator had in fact and in law, been adjudged in contempt by the Senate of the United States and had been arrested pursuant to such warrant.

[fol. 57] In the Matter of Robert W. Stewart, Petitioner, Habeas Corpus 1488, in the Supreme Court of the District of Columbia;

McGrain vs. Daugherty (1926), 273 U. S. 135;

Marshall vs. Gordon (1916), 243 U. S. 521.

4. The said Resolution and the warrant issued pursuant thereto are in form and words similar to and in legal effect the same as the resolutions by the Senate passed and warrants by it issued in the following cases wherein an action of trespass for false arrest and imprisonment was brought against the officers of the House of Representatives or Senate, respectively, who served the warrant on the relator and arrested him for a contempt alleged in the resolution authorizing the said warrant to issue:

Anderson vs. Dunn (1821), 6 Wheaton 204;

Kilbourn vs. Thompson (1880), 103 U. S. 168;

In re: Chapman (1896), 166 U. S. 661.

5. On the 26th day of March, 1928, the Senate of the United States passed a motion, wherein it referred to the United States District Attorney for the District of Columbia, under the Act of January 24, 1857 (11 Stat. 155) relating to the punishment of contempt as a crime, its report made on March 22, 1928, being report No. 603, relating to the "contumacy of Thomas W. Cunningham, a witness before the committee for appropriate action by that officer," as the following excerpt relating thereto, as set forth in the Congressional Record of March 26, 1928 shows:

"Mr. King: Mr. President, I am directed by the Special Committee to Investigate Expenditures in Senatorial Primary and General Elections to submit a resolution in the [fol. 58] form of a motion. Pursuant to such direction I move that the President of the Senate be directed to certify to the United States district attorney for the District of Columbia the report made on March 22, 1928—being Report No. 603—by the Special Committee Investigating Expendi-

tures in Senatorial Primary and General Elections, relating to the contumacy of Thomas W. Cunningham, a witness before the committee, for appropriate action by that officer.

Mr. Robinson of Arkansas: Mr. President will the Senator yield.

Mr. King: I yield.

Mr. Robinson of Arkansas: Does this follow the precedent recently established in what is known as the Stewart case?

Mr. King: I think it does.

The Presiding Officer: The question is on agreeing to the motion of the Senator from Utah.

The motion was agreed to.

6. The 69th Congress, in which the alleged contumacious conduct was committed expired without taking any action on the recommendation of the said Special Committee of that Congress, that relator be adjudged in contempt; and the power to punish ceased with the dissolution of that Congress under the Constitution.

7. Relator has obeyed every subpoena of the Senate of the United States served on him during the 69th Congress by the Special Committee appointed and acting under authority of Senate Resolution 195 of that Congress.

8. Relator has never been requested or summoned by subpoena of the United States Senate, in the 70th Congress, to appear as a witness before its Special Committee originally appointed under Resolution 195 of the 69th Con- [fol. 59] gress and continued and revived under Senate Resolution 10 of the 70th Congress; and consequently, has never refused to obey any request and subpoena of the 70th Congress.

9. Relator submits to the judgment of this Honorable Court the conclusion of John J. McGrain, Deputy Sergeant-at-Arms of the Senate, as set forth in the return of the respondent, to the effect that the Senate has not adjudged the relator guilty of contempt for alleged contumacy as a witness before the Special Committee of the Senate in the 69th Congress; and suggests that if the said Deputy Ser-

geant-at-Arms of the Senate is correct in his conclusion, then the warrant on which relator was arrested, is illegal, void and without effect, being an abuse of judicial process.

Wherefore, relator avers that he has committed no contempt in the 69th Congress; that the 69th Congress has not adjudged him in contempt; that no contempt has been committed by him in the 70th Congress; and if relator has at no time been adjudged guilty of contempt by the Senate in the 70th Congress, as concluded by John J. McGrain, its Deputy Sergeant-at-Arms, as set forth in respondent's return, and if relator has neither been requested to appear nor subpœnaed as a witness by either the Senate, or its revived Special Committee after that Congress convened, that it is a usurpation of power and abuse of judicial process "to take into custody the body of the" relator "and to keep * * * Thomas W. Cunningham in custody to await further order of the Senate;" and also for the Vice President of the United States, in discharge of his duties as President of the Senate, to certify to the United States District Attorney for the District of Columbia, under the [fol. 60] Act of Congress relating to the punishment of contempt as a crime, the "contumacy of Thomas W. Cunningham as witness before the committee for appropriate action by that officer."

Your Relator, Therefore, Prays for an order discharging him from the custody of the said David S. Barry, Sergeant-at-Arms and John J. McGrain, Deputy Sergeant-at-Arms of the United States Senate.

And he will every pray, etc.

Thomas W. Cunningham, Relator.

Duly sworn to by Thomas W. Cunningham. Jurat omitted in printing.

In United States District Court

Opinion sur Hearing Upon Petition, Writ, Return, and Traverse—Filed Apr. 20, 1928

Dickinson, J.:

We were asked to allow this writ to be made returnable forthwith but to continue the hearing to April 5th,

[fol. 61] 1928, in order that the questions raised might be argued by counsel. This was accordingly done.

At the conclusion of the argument at Bar, we were asked to withhold a ruling, with leave to submit written Briefs. This leave was granted, but as the cause should be decided promptly, leave was further given either party to ask for a ruling at any time whether the Briefs had been filed or not. The cause is now ripe for a ruling.

We were further asked to notify counsel before the ruling to be made was handed down. This has been done in the form of a copy of the opinion proposed to be filed.

We follow further our usual practice, for appellate and other reasons, not to enter a formal decree as part of the ruling indicated in the opinion but to enter the decree in accordance with the leave granted so to do so that the terms and form of it could be settled after notice to counsel.

Conclusion

The conclusion reached is that the relator should be remanded. A due respect, however, for the industry, as well as ability, displayed by counsel impels us to put of record a statement of the reasons which have led us to the conclusion reached.

Discussion

This is a hearing upon Habeas Corpus. There is a preliminary question into which we do not go because it is not really raised. This is the jurisdictional power and duty of this Court to inquire upon Habeas Corpus into the right of a relator to his liberty. This power and correlative duty we assume does not call for vindication although it has [fol. 62] been discussed with some fullness. The closest analogue of which we know is that of the type of cases in which the relator is being held under process to enforce his attendance for trial before another Court and emphatically a Court of another and distant jurisdiction. The principles which control in such cases are simple and the questions to be determined few. Every such relator has two rights. One is to a fair trial before an impartial tribunal and sometimes one of the vicinage. The other right (which is often a right of greater practical importance) is to be

saved the ignominy and expense of defending to an unjust and unfounded accusation. Both these rights are constitutional in that they are assured to him by the fundamental law of every jurisdiction. His claim to the latter right is in the ordinary course of the administration of the criminal law assured to him by the finding of a committing Magistrate or a Grand Jury but he has further assurance in his right to invoke the judgment of a Court through Habeas Corpus proceedings. The questions which then arise are commonly formulated as (1) identity; (2) probable cause, and (3) the jurisdictional power behind the process by which he is held. Pursuing the analogue suggested, identity is here admitted and so likewise are probable cause, and jurisdiction, if the distinction next discussed, is observed. These two questions are prone to overlap if this distinction is not observed. Probable cause is nothing more than another name for the second right to which we have adverted. We have a firmer grasp of the real thought if we present it to our minds in the form of the question of whether there is justification for putting the relator on trial. This is the question which the Committing Magistrate, the Grand Jury and the Court upon Habeas Corpus alike propound and answer. None of these tribunals have anything to do with [fol. 63] the question of guilt. That is for the Trial Court. When the former question is framed as one of "probable cause," there is always danger that it will become the question of whether ground has been shown for a belief in the probable guilt of the relator and thus become a question of the degree of strength of the proofs. Of course sometimes, and indeed ordinarily, it comes practically to this but the thought presented is kept clearer (at least to some minds) if presented as a question of justification for putting the relator on his trial. Nor do we understand there is any denial of the broad power of the Senate to conduct an inquiry through the judicial forms of compelling the attendance of witnesses from whom testimony is desired as an aid to legislation or when the Senate is sitting as a Court to judge the election returns and qualifications of any one claiming membership in that body. At all events, McGrain vs. Daugherty, 273 U. S. 135, is a sufficient citation to uphold the assertion of this power.

The petition for the writ of habeas corpus proceeds upon the fact theory that the relator had been adjudged by the Senate to have been guilty of the offence of a contempt of its lawful power and of its dignity and to have been taken into custody as a punishment or to have a sentence of punishment imposed. In other words, the process here is execution process in the general nature of a writ of capias ad satisfaciendum. We are hence asked to pronounce judgment under the fact situation thus presented, upon the power of a Senate as a constituent of the 70th Congress to summarily convict one, not a member, of a past offence committed against the dignity of the Senate sitting as a constituent part of the 69th Congress.

There is further urged as part of the law of the land a [fol. 64] proposition which we will formulate by a paraphrase of the language of the opinion in the Daugherty case (supra). The proposition is as follows:

The Senate does not possess a "general power of making inquiry into the private affairs of the citizens" nor to compel disclosures relating thereto. A witness in consequence may rightfully refuse to answer questions relating to matters beyond the bounds of the lawful power of inquiry or when the questions are not pertinent to the matter under inquiry.

This proposition of law is sought to be invoked and applied to the situation of this relator through the fact averments (1) that the head and front of the offending of the relator consists wholly in his refusal to answer impertinent and irrelevant questions directed wholly to his personal, private affairs which have no relation to inquiries charged with any public interest, and (2) that the Senate in convicting him of contumacy has done so in disregard and violation of the law as above expounded. The truth is averred to be that the relator is and at all times has been ready and willing to testify as to all matters save only those in his refusal to answer which he has the support of the law.

A number of other questions of grave importance and great interest have been argued with forceful emphasis and notable eloquence. Into none of them do we feel the call to go because we do not find them to be in the case. In the first place, the character of the questions which have

been addressed to the witness is a matter into which we could not go without ignoring the very distinction which we have sought to draw. It is the distinction between the propriety of a relator being put upon trial and the merits of the case when tried. The latter must be judged by the trial Court; it is only the former upon which the Court in [fol. 65] the habeas corpus hearing can pass. This very situation was before the Court in the Daugherty case. It was there held that the propriety of no specific question was before the Court. There is likewise none presented to us. We are further unable to make the finding that the relator is being deprived of his liberty as a punishment for an offense of which he has been convicted.

The return to the writ discloses that he had been taken into custody by authority of a warrant of arrest or attachment issued by the Senate of the United States in pursuance of a resolution, which reads as follows:

"Whereas it appears from the report of the special committee investigating expenditures in senatorial primary and general elections that a witness, Thomas W. Cunningham, twice called before the committee making inquiry as directed by the Senate under S. Res. 195 of the Sixty-ninth Congress, declined to answer certain questions relative and pertinent to the matter then under inquiry; Therefore be it

Resolved, That the President of the Senate issue his warrant commanding the Sergeant-at-Arms or his deputy to take into custody the body of the said Thomas W. Cunningham wherever found, and to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere, as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate."

As we analyze the facts, the only question presented is whether the Senate in the course of an inquiry in aid of legislation or when sitting as a Court to determine the election returns and qualifications of those claiming the right to sit as members of that body has lawful power to enforce [fol. 66] the attendance of any one not a member to give testimony. This question we find to have been authorita-

tively answered in the cited case. Every Court must have this power or cease to function and the Senate must likewise possess it. The formal resolution declares that the attendance of the relator is required for this purpose. We are not asked to find, and surely could not find, that the real purpose was other than has been declared. The suggestion has however been made that the indicated power may be abused. No one could deny the existence of such a possibility. If, however, such a possibility was a reason for withholding power none would ever be granted. None of the powers, the possession of which is sanctioned by our Constitution nor even those expressly and in terms granted, are free from the theoretical possibility of abuse. The very same suggestion was advanced without avail in the Daugherty case. It is undeniable that the ordinary process to secure the attendance of a witness is by subpœna and that there is as a matter of common practice no resort in the first instance to attachment. The choice of the process, however, and when an attachment may issue is a matter resting in the sound discretion of the Court issuing the writ. Any person who was willing to attend as a witness and to testify and who had given no indication of any intention to evade the service of a subpœna or to disobey its mandate but who without any justification was served with an attachment without excuse for the employment of physical force to drag him to the witness stand, would assurredly be given a sympathetic hearing by any Court, if he asked to be relieved from imprisonment. He could fairly and hopefully raise the question of the lawfulness of the curtailment of his freedom. No such question is however here raised. [fol. 67] The intention to raise it has been expressly disclaimed. The preamble to the resolution, which has been made the subject of severe criticism on other grounds, we read as a mere statement of the facts which in the sound discretion of the Senate justified the issuance of an attachment rather than a subpœna. That the Senate did not misjudge the attitude of the relator was confirmed by an incident of the habeas corpus hearing. Anticipating the point might be made and to definitely get it out of the way, if not to be raised, the relator was asked through his counsel if he would give assurance of his attendance if the warrant of arrest or attachment were treated as a mere subpœna.

The answer was an emphatic negative. We find no fault with this answer as we interpreted it as the wish of the relator (as is his right) to ask the judgment of this Court upon the question of the lawful power of the Senate to enforce his attendance as a witness, in the language of the resolution, to testify in answer to such pertinent and proper questions as might be addressed to him. Our answer is that the Senate does possess this power.

This means that the relator should be remanded to the custody of the respondent, and a formal decree to that effect may be submitted.

IN UNITED STATES DISTRICT COURT

ORDER REMANDING RELATOR—Filed April 20, 1928

This cause came on to be heard on the petition for the writ of habeas corpus, the writ issued thereon, the return of the respondents filed herein, and the traverse to return, and upon the said pleadings was argued by counsel for the respective parties and submitted to the Court.

[fol. 68] Upon consideration whereof, it is by the Court this 20th day of April, A. D. 1928,

Adjudged and ordered, that said Thomas W. Cunningham be, and he is hereby, remanded to the custody and control of the respondents and the writ of habeas corpus be, and it is hereby, discharged.

By the Court:

(Signed) Dickinson, J.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 20, 1928

To the Clerk of the said Court:

Please take notice that the relator, Thomas W. Cunningham, by his Attorneys Benjamin M. Golder, Esq., and Ruby R. Vale, Esq., hereby appeals from the judgment and

order entered on April 20, 1928, in the above entitled proceeding before Dickinson, District Judge.

Benj. M. Golder, Ruby R. Vale, per Otto Kraus, Jr., Attorneys for Relator, Appellant.

IN UNITED STATES DISTRICT COURT

ACKNOWLEDGMENT OF SERVICE OF NOTICE—Filed April 20, 1928

Service of notice of the appeal by the relator in the above entitled proceeding is hereby acknowledged and accepted.

Howard Benton Lewis, Attorney for Respondent, Appellee, with Hon. Geo. W. Wickersham.

April 20, 1928.

[fol. 69] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed April 20, 1928

And now, to wit, April 20, 1928, comes the above relator, Thomas W. Cunningham, by his attorneys, J. Elwood Dukes, Esquire; Otto Kraus, Jr., Esquire; Benjamin M. Golder, Esquire and Ruby R. Vale, Esquire, and files the following Assignments of Error to the judgment and order of the Court in the above entitled cause.

I. The District Court aforesaid erred in entering its order remanding the relator to the custody of David S. Barry, Sergeant at Arms of the United States Senate; John J. McGrain, Deputy Sergeant at Arms, a true and correct copy of said order being as follows:

"Order

This cause came on to be heard on the petition for the writ of habeas corpus, the writ issued thereon, the return of the respondents filed therein, and the traverse to return, and upon the said pleadings was argued by counsel for the respective parties and submitted to the Court.

Upon consideration whereof, it is by the Court this 20th day of April, A. D. 1928,

Adjudged and ordered, That said Thomas W. Cunningham be, and he is hereby, remanded to the custody and control of the respondents and the writ of habeas corpus be, and it is hereby discharged.

By the Court:

Dickinson, J."

2. The District Court aforesaid erred in refusing to grant a writ of habeas corpus in conformity with the petition filed by relator in the above entitled cause praying therefor.

[fol. 70] 3. The District Court aforesaid erred in refusing to discharge the relator, Thomas W. Cunningham, from custody of the said David S. Barry aforesaid.

4. The District Court aforesaid erred in dismissing the petition for the allowance of a writ of habeas corpus filed by the Relator, Thomas W. Cunningham, aforesaid.

J. Elwood Dukes, Benj. M. Golder, Otto Kraus, Jr., Ruby R. Vale, Attorneys for Relator and Appellant.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION SUR MOTION TO ADMIT RELATOR TO BAIL PENDING APPEAL.—Filed April 20, 1928

Dickinson, J.:

The ruling made is that the motion be denied. We think, however, the reasons for so ruling should be stated. Counsel for relator assert with force and much seeming truth that this ruling denies to the relator his right to an appeal. If it denies him any right which belongs to him by law it is wrong. We are not concerned, however, with rights but with legal rights. A legal right is the right to something. The legal right of the relator is to a resort to whatever appellate action the law gives him. One is an appeal from the order made. That right we accord him and have al-

[fol. 71] lowed an appeal. Another right is to apply to the Court for what is really a supersedeas. The Act of Congress imposes upon the trial Court the duty to grant or refuse this application in the first instance. It is thus clear that the question is not one of any right of the relator but wholly one of the exercise of the sound discretion of the Court. Should the relator be admitted to bail pending an appeal?

The comment of counsel has some truth in it but the truth is a half truth. What counsel present is in full truth a practical dilemma. The presence of the relator as a witness is required in a pending proceeding. This Court has ruled (perhaps in error) that he should attend. If the execution of this judgment is not superseded his attendance may be compelled before his appeal is heard; if it is superseded the inquiry may be concluded before the appeal and the judgment will thus come to naught. We are thus confronted with a condition with which we must deal. The best because the only practical way out of this dilemma, as we see it, is to refuse the supersedeas and thus refer the whole question to the Appellate Court. A Judge sitting as a Trial Court might well refuse a supersedeas, although the same Judge sitting as an Appellate Court might at once grant it. The reason is that in the latter capacity he could escape the dilemma presented by speeding the disposition of the appeal; in the former he could not.

We will afford the relator an opportunity to present his motion to the Appellate Court. We hope this will enable the parties to escape any evil consequences from this dilemma. In all events it lets us out.

[fol. 72] In United States District Court

Decree Denying Motion to Admit Relator to Bail Pending Appeal—Filed April 20, 1928

And now, April 20, 1928, the above motion having come on to be heard and having been argued by counsel, it is ordered, adjudged and decreed that the said motion be and

it hereby is denied, in accordance with the memorandum opinion filed herewith.

By the Court:

(Signed) Dickinson, J.

In United States District Court

Order Allowing Supersedeas—Filed April 20, 1928

And now, this 20th day of April, A. D. 1928, the relator in the above entitled case having taken an appeal to the U. S. Circuit Court of Appeals for the Third Circuit, it is

Ordered that at any time pending said appeal, the said relator may be at large upon his executing a recognizance before the Clerk of the District Court of the United States for the Eastern District of Pennsylvania, with surety, in the sum of $1,000.00, conditioned for his appearance at said District Court to answer the judgment of the United States Circuit Court of Appeals for the Third Circuit; it is further

Ordered that the entry of said recognizance operate as a supersedeas pending said appeal.

(Signed) J. Warren Davis, Circuit Judge.

[fol. 73] In United States District Court

Praecipe for Transcript of Record—Filed April 30, 1928

To the Clerk:

In making up the Transcript of Record in the above matter you are to include the following:

Docket Entries.

Petition for Writ of Habeas Corpus and Order of Court thereon.

Writ of Habeas Corpus and Marshal's return thereon.

Stipulation of counsel and order of Court fixing bond.

Respondents' return to the Writ.

Traverse to Return.

Opinion, Dickinson, J.

Order of Court discharging Writ of Habeas Corpus and remanding relator.

Notice of Appeal and acknowledgment of service thereof.
Assignments of Error.
Memorandum Opinion, Dickinson, J., sur motion for allowance of supersedeas.
Order, Dickinson, J., denying supersedeas.
Order, David, C. J., granting supersedeas.
Clerk's certificate
and no others.

B. M. Golder, of Counsel for Relator, Appellant.

[fol. 74] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 75] Minute entry of argument and submission May 26, 1928, omitted in printing.

[fol. 76] In United States Circuit Court of Appeals for the Third Circuit, March Term, 1928

No. 3856

United States ex rel. Thomas W. Cunningham, Appellant,

v.

David S. Barry, Sergeant-at-Arms of United States Senate, et al., Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Woolley, and Davis, Circuit Judges

Opinion—Filed November 26, 1928

Buffington, C. J.:

On May 16, 1926, the Senate of the United States by Resolution 195 created a committee and provided "said Committee is hereby authorized and instructed immediately

to investigate what moneys, emoluments, rewards or things of value, including agreements or understandings of support for appointment or election to office have been promised, contributed, made or expended, or shall hereafter be promised, contributed, expended or made by any person, firm, corporation, or committee, organization or association, to influence the nomination of any person as a candidate of any political party or organization for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the General Election to be held in November, 1926. Said committee shall report the names of the persons, firms, or corporations, or committees, organizations, or associations that have made or shall hereafter make such promises, subscriptions, advancements, or payments and the amount by them severally contributed or promised as aforesaid; including the method of expenditure of said sums or the methods of performance of said agreements, together with all facts in relation thereto."

The resolution further provided "Every person who, having been summoned as witness by authority of said committee * * * who having appeared refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by Section 102 of the Revised Statutes of the United States." Such section provided:

"Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months."

In response to a subpoena, Thomas W. Cunningham appeared before the Committee, was sworn and testified as follows:

"Q. With what political organization were you connected during the recent primary in Pennsylvania—the last primary?

[fol. 77] "A. The Republican organization of Philadelphia County.

"Q. Who was the chairman of that organization?

"A. Thomas F. Watson.

"Q. And what candidate for the Senate was that organization supporting?

"A. Congressman Vare—W. S. Vare.

"Q. Did you collect any money for use in that campaign?

"A. I did not.

"Q. Was any money given to you for use in that campaign?

"A. Not one cent.

"Q. I mean to include in money, of course—checks or drafts or anything——

"A. No checks, no drafts, or anything.

"Q. That you got money on?

"A. No, sir.

"Q. Did you handle any money in that campaign?

"A. I did not.

"Q. Did you deliver any money to any person?

"A. I did.

"Q. That is handling money, Mr. Cunningham.

"A. I did not catch your way of saying that.

"Q. Very well. To whom did you give any money?

"A. I handed money to Thomas F. Watson, $25,000, on the 10th day of April, 1926.

"Q. Where did you get that money?

"A. I got that money out of my own private funds.

"Q. Your own private moneys?

"A. Yes, sir; my own money; my own money.

"Q. How long had it been your own money?"

At this point the attorney of Cunningham who had previously been directed by the chairman that "It would be entirely proper for you to address yourself to the chair and state your objection, the same as you would to a Court," made objection which, as pertinent to the question here involved was, "I have further advised Mr. Cun-

ningham that he need not disclose to this Committee from what part of his personal fortune, he paid the money to Mr. Watson that he did pay during this last campaign in Pennsylvania." The examination then proceeded:

"Q. How long had it been your own money?

"A. I refuse to answer that question, Senator, as a personal question. It is my own private business.

"Q. Where did you get this $25,000 you say you gave to Mr. Watson?

"A. I refuse to answer that question. I think that is personal.

"Q. Where were you keeping this $25,000 before you gave it to Mr. Watson?

"A. That is another personal question, Senator. I refuse to answer it.

"Q. Did you give this money to Mr. Watson in cash or by check?

"A. I gave it to him as cash.

"Q. Where were you when you gave it to him?

"A. I took it down to his headquarters at the Walton Hotel on the 10th day of April.

"Q. Did you have it in your pocket when you gave it to him—before you gave it to him?

"A. Yes, sir.

"Q. Where did you get it from to put in your pocket?

"A. That is a personal question, and I decline to answer it.

"Q. How long had you had this money in your possession?

"A. That is another personal question, and I decline to answer it. It was my own money and I do not think I should tell the public where I kept it and how I got, or anything else about it.

"Q. How long have you been clerk of the quarter sessions courts?

[fol. 78] "A. Twenty one years the 1st of January, 1926.

"Q. What is the salary of that position?

"A. $8,000 a year.

"Q. Was this money which you refer to as the $25,000 that you gave to Mr. Watson savings from your salary?

"A. That is another personal question. I cannot answer that.

"Q. Unfortunately, a good many questions are personal.

"A. Yes, I think a man's own money is one of his own personal privileges, and he is not supposed to tell how he got it or how he saved it. I think that is a rather unfair question to ask me, how I got the money, how I saved it, and what I done with it.

"Q. I dare say. Is there anything wrong or wicked or crooked about the way you got this money, so that it will embarrass you to answer the question or will subject you to criminal prosecution?

"Mr. Golder: I think that is an unfair question, Senator, and I advise Mr. Cunningham to disregard it.

"Q. If you were to answer the questions I have asked you with regard to the sources from which and the way in which this money came to you would it tend to subject you to criminal prosecution or public contempt or obloquy?

"Mr. Golder: Senator Reed, I think that question is objectionable in form and the way in which it is put, and I advise Mr. Cunningham not to consider it, or not to answer it.

"Q. Do you refuse to answer, Mr. Cunningham?

"A. Yes; I refuse to answer * * *

"Q. Did you give any other money than the $25,000 to anybody during this campaign?

"A. Yes; on the 13th of April I gave Mr. Watson $25,000 more.

"Q. So that you gave Mr. Watson a total of $50,000?

"A. $50,000; of my own money.

"Q. Where did you get the second $25,000 from?

"A. I refuse to answer that question, Senator.

"Q. You refuse to tell the committee anything about where you received this money from?

"A. Yes; I do.

"Q. The sources from which the money was received?

"A. Yes.

"Q. How long had the money been in your possession? You refuse to tell that to the committee?

"A. I certainly do, because I think that is a personal, private question.

"Q. How long had you been saving up or accumulating this $50,000?

"A. I do not like to object to your questions, Senator, because I think a man's own money—why I don't want to make it public to the press, to the newspapers in Philadelphia, about my private affairs, how I got this money or how I saved it.

"Q. Have you inherited any considerable sums of money?

"A. Never inherited a dollar in my life.

"Q. Have you been speculating in stocks or bonds or upon the board, so that you accumulated the money in that way?

"Mr. Golder: I object to that question and advise Mr. Cunningham that he need not answer.

"Q. What does the witness say?

"A. I refuse to answer.

"Q. Have you turned in on your tax returns any $50,000 for taxation purposes?

"Mr. Golder: I object to that question, Senator, and advise the witness that he need not answer.

"A. I refuse to answer.

[fol. 79] "Q. Have you paid to the State of Pennsylvania, the county in which you live, or the city in which you live, any taxes upon this $50,000?

"Mr. Golder: I object to that question, Senator, and advise the witness that he need not answer. As a matter of fact, there is no taxation in Pennsylvania on any such amount.

"A. I refuse to answer, Senator.

"Q. Have you returned to the Federal Government this $50,000 in any form?

"Mr. Golder: I object to that question, Senator, and advise the witness he need not answer.

"A. I refuse to answer.

"Q. Did you collect any money from persons employed either by the City of Philadelphia or by the State of Pennsylvania?

"A. Not one dollar.

"Q. Were any moneys paid to you by any of these persons I have just referred to?

"A. No, sir.

"Q. Do you know of any collection of money from State employees for political purposes?

"A. I do not, Senator * * *

"Q. How long have you known Congressman Vare?

"A. Ever since I have been a boy—35 or 40 years, I guess.

"Q. Were you in any way connected with his campaign committee, the committee which was conducting his campaign in the last primary?

"A. Only in one way; I was for him after he concluded to be a candidate for United States Senator.

"Q. Did you ever talk with him?

"A. I talked with him on several occasions about it.

"Q. With him during the campaign?

"A. No, sir. This was prior to the campaign, before he came out as a candidate.

"Q. Did you urge him to come out?

"A. No; I rather urged him the other way, Senator.

"Q. When he did come out, you became one of his supporters?

"A. Because our organization, as a rule—if the majority make up their mind to be a candidate—the majority made up their minds for William S. Vare, and I went along with the majority.

"Q. When you speak of 'our organization,' what organization do you mean?

"A. The Republican City Committee of Philadelphia. We have forty eight wards; forty eight members of that committee.

"Q. Are you a member?

"A. A member of that committee; yes, sir.

"Q. For which ward?

"A. The tenth ward.

"Q. During the campaign, then, after the organization resolved to support Vare, you gave him your loyal support?

"A. Yes, sir.

"Q. Who asked you to make this contribution of $50,000?

"A. Nobody asked me, Senator. I will tell you the reason why I made this contribution. I was a Penrose man to the day he died, in Philadelphia. Eddie Beidleman and Harry Baker have been the same as my two sons, and were very close friends of Penrose's to the day of his death. Beidleman's ambition was to be governor. I was for Beidleman four years ago. George Alter was picked, and he had to step aside. This time I thought that he would make the best governor Pennsylvania ever had. I thought he was the most practical man in the State of Pennsylvania, a man who was a member of the legislature. State senator for four years, lieutenant-governor four years, and a real man, and I thought he would make the best governor Pennsylvania ever had, and I was very fond of him. Now that was my whole interest.

"Q. Had you ever made any such contribution as this before out of your own money?

"A. Never before in my life. I had made small contributions, a hundred or five hundred dollars at different times, to help some poor fellow running for council."

[fol. 80] Thereupon the Chairman cautioned the witness of the consequences of his refusal to answer, and the witness replied as follows:

"The Chairman: Mr. Cunningham, I want to be perfectly frank with you. It will be the duty of the committee to report you to the United States Senate for contempt. That is not a threat; we are not making threats. That is the fact. Then, of course, it will have to be determined whether you have to answer these questions. What the result may be will have to be determined by the Senate and possibly by the courts. I think it is only fair to make that statement to you, and having made it, I ask you if you adhere to the position you have taken in your various refusals to answer?

"Mr. Cunningham: I do, Senator."

On February 21, 1927, Cunningham again appeared before the Committee, his testimony as above was read to

him and he again declined to answer in the following colloquy.

"Q. We have called you here for the purpose of giving you an opportunity to purge yourself of what was regarded as contempt of the committee and of the Senate. Do you still stand upon your refusal to answer the questions which were asked you on the previous hearing?

"A. I do, sir.

"Q. You have nothing to say further as to your reasons for refusing to answer than you stated before?

"A. I have not.

"Q. Mr. Cunningham, I think you will have to agree that at least the committee has given you every opportunity to make an explanation. If you do not desire to make it, of course, you have the right.

"A. The only thing I was interested in, as I told you before, Senator, was Beidleman, and not any other project. If he had not been on the ticket I would not have given it.

"Q. Do you know whether it was reported in Mr. Beidleman's campaign expenses?

"A. I really do not know that. I instructed Mr. Watson what my thought was about it, because he had been a friend of mine for forty-odd years, and that was my only interest in it."

Subsequently the Committee reported to the Senate as follows:

"The witness, Cunningham, refused to amplify his testimony in any particular, stood on his previous refusals to answer the interrogatories propounded to him, and defied the jurisdiction of your committee.

"Your committee therefore reports the defiant and contumacious conduct of the said witness, Thomas W. Cunningham, and recommends that he be adjudged in contempt of your committee and of the Senate of the United States."

And thereafter by resolution 179 the Senate reciting that Cunningham had twice appeared before the Committee and "declined to answer certain questions relevant and pertinent to the matters then under inquiry," resolved:

"That the President of the Senate issue his warrant commanding the Sergeant-at-Arms or his deputy to take

into custody the body of said Thomas W. Cunningham wherever found, and to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate."

Thereafter the presiding officer of the Senate signed a warrant of arrest which ordered the Sergeant-at-Arms of the Senate to "forthwith arrest and take into custody and [fol. 81] bring to the bar of the Senate Thomas W. Cunningham," who on being arrested sued out a writ of Habeas Corpus to the Court below praying his discharge. This the Court refused to do, whereupon Cunningham took this appeal.

An examination of the proceedings shows that this is not the case of a person who refused to obey a subpœna to appear before the Senate, as was the fact in McGrain v. Daugherty, 273 U. S. 135, but of a witness who has duly twice appeared before a committee of the Senate and submitted himself to examination, but has rightfully or wrongfully declined to answer certain questions then asked. The record shows that such refusal to answer certain specific questions was the sole ground of the Senate's action and therefore the sole ground of Cunningham's arrest. To contend the warrant of arrest was a subpœna to appear and testify, and not an arrest for contempt after he had duly appeared is to ignore the real situation. If the warrant of arrest is not based on the witness's alleged contempt in refusing to answer the questions propounded by the committee, it has no ground justifying its issue, for he did duly appear. And if it is regarded as an arrest to procure Cunningham's attendance as a witness, a subpœna served on him and neglect on his part to appear constitute the prerequisite preliminaries before an attachment for non attendance issues.

No case or proceeding has come to our attention either through counsel or independent research in which either branch of the Congress has exercised the power of attachment without the prerequisite opportunity given to a wit-

ness to appear in response to a subpœna—a course which, in our judgment, the case of McGrain v. Daugherty, supra, assumes should be followed, and where it is said "The warrant was issued as an auxiliary process to compel him (the non-attending and duly subpœnaed witness) to give the testimony sought by the subpœna."

Turning, then, to the underlying question, was Cunningham in contempt in declining to answer the questions asked? The answer to that is, Were such questions relevant to the inquiry the Committee was authorized to make? That inquiry, so far as here pertinent, was "to investigate what moneys * * * have been * * * contributed * * * by any person * * * to influence the nomination of any person as a candidate * * * for membership in the United States Senate, or to contribute to or promote the election of any person as a member of the United States Senate at the General Election to be held in November 1926." Such being the items of inquiry, the resolution provided for a report thereof to the Senate by the committee of such items, viz., "said committee shall report the names of the persons * * * that have made such * * * payments and the amounts by them severally contributed * * * including the methods of expenditure of said sums * * * together with all facts in relation thereto." And that the matters so specified constituted the scope of the committee's inquiry was evidenced by the resolution providing for imposing the penalties of Revised Statute 102 upon a witness who "having appeared refuses to answer any question pertinent to the investigation heretofore authorized." Turning to the inquiry heretofore specified as authorized, we note that Cunningham, as bearing on "what moneys * * * have been contributed," testified he had contributed fifty thousand dollars. As bearing on the question whether such money was contributed "to influence the nomination of any person as a candidate for membership in the United States Senate," he testified that he paid the money to Thomas F. Watson, treasurer of a political organization which was supporting Vare for nomination for United [fol. 82] States Senator and Beidleman for Governor; that while he favored and supported Vare as a candidate, his

whole object in giving the money was to assist Beidleman, and if Beidleman "had not been on the ticket I would not have given it." Touching the subject of investigation described as "including the method of expenditure of said sums," Cunningham testified he did not know whether his contribution had been reported in Beidleman's campaign expenses, adding, "I instructed Mr. Watson what my thought was about it." It will thus be seen that Cunningham answered the questions asked him on the subjects specified in the resolution, and that his answers enabled the committee, so far as the inquiry concerned him, to fulfill the specified duties of their appointment, viz., to "report the names of the persons * * * that have made * * * payments and the amount by them severally contributed * * * including the method of expenditure of said sums." Such being the case, we do not see that proof of how Cunningham came by the money he says he thus personally contributed, could affect the objects of investigation referred to by the Senate to the Committee. Suggestions were made by one side at the argument that if the witness answered it might throw light on the subject of investigation, and by the other side that while the witness's answer might throw no such light, a statement by the witness might do him much harm. But a ruling on the admissibility of evidence is not made on surmises. It is based on the ground that the burden of showing the relevancy of any testimony which is objected to is on him who proposes to give it. As we have seen in the proofs the witness had answered, as pertinent to the investigation, that he did not "collect any money for use in that campaign," that no money was given to him for use in the campaign; that no one asked him to contribute the $50,000. There being nothing in the record to show the relevancy of the question and no ground for relevancy being shown by counsel when interrogated at the argument, the case narrows down to whether the witness was in contempt in refusing to have his private affairs as to where he got this money made a matter of public investigation. The right of agencies of Government to investigate cannot be denied or thwarted, but in statute and decision, we find the line it may not cross is the barrier provided by Statute

(R. S. 102) which permits only questions "pertinent to the question under inquiry," and as to those without that limit as lately stated by the Supreme Court in McGrain v. Daugherty, supra, "a witness rightfully may refuse to answer where * * * the questions are not pertinent to the matter under inquiry."

After full consideration, we are of opinion no facts, reasons or grounds have been shown or now appear which make pertinent the inquiry into how Cunningham made the money which he admits he contributed. That a situation might arise where the facts would show such questions were pertinent goes without saying, but under the present situation and no such facts appearing, we hold Cunningham was justified in declining to answer the questions asked him, and that this warrant, whose only foundation is alleged contempt for refusal to so answer, has no support in law. Accordingly we hold the Court below was in error, and the record will be remanded with instructions to discharge the petitioner.

[fol. 83] In United States Circuit Court of Appeals

Dissenting Opinion

Woolley, Circuit Judge, dissenting:

I am constrained to dissent from the judgment of the court, first on its statement of the case and next on the applicable law. I distinguish between the case as stated and the case may by the record, as I read it. The court has stated the case as though the Senate of the United States had in fact adjudged Cunningham, the relator, guilty of contempt for refusing to answer questions which its committee had theretofore propounded to him, and, standing on that predicate it has entered into a discussion of the relevancy and validity of the questions asked and the relator's justification for refusing to answer them. As I read the record there was no such adjudication for contempt. There was nothing more than a recommendation by a committee that the Senate adjudge him in contempt. On that recommendation the Senate did not act. In truth, the Senate has

neither tried nor convicted Cunningham for contempt. Nor has it indicated a purpose to try him. All it did was to authorize the issuance of a warrant of arrest, which, as I read the record, is the real beginning of the controversy here on an appeal from an order of a district judge dismissing the petition for a writ of habeas corpus. The warrant of arrest is not a contempt process, original or execution. It is an exercise by the Senate of the United States of its power to call a person before it and interrogate him in regard to matters of legislation or of determining "the election, returns and qualifications" of one claiming the right to sit as a member of that body. The power of the Senate to "judge of the elections, returns and qualifications to its own members" is expressly conferred by the Constitution, (Article I, Section 5) and the Supreme Court has said that "the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective. * * * The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." McGrain v. Daugherty, 273 U. S. 135. Very recently, in Reed v. The County Commissioners of Delaware County, Pennsylvania, U. S. , the Supreme Court, speaking of the same subject, said that the Senate "is fully empowered and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections. * * * By means of its own process or that of its committee, the Senate is empowered to obtain evidence relating to matters committed to it by the Constitution." That, I think, is precisely what the Senate, conformably with precedent, did in this instance, being particular to embody in the resolution which authorized the warrant of arrest its purpose, which was not to punish the relator for past contumacy or to try him for contempt, but "to bring (him) before the bar of the Senate * * * to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate,

may propound." Clearly the warrant of arrest in this case is a "process to enforce" the Senate's "power of inquiry." What questions the Senate may lawfully ask, when in response to the warrant the relator is produced before that body, surely this court should not anticipate or pre-judge. Nor should it determine their propriety or validity from the possible impropriety, irrelevancy, or invalidity of questions previously asked.

Moreover, I am not persuaded to the contention advanced by the relator and adopted by the court that the warrant [fol. 84] of arrest is in itself invalid. The power of the Senate to judge the elections, returns and qualifications of its members is essentially judicial, and to make that power effective it also has power, like all other judicial tribunals, to compel attendance of witnesses by compulsory process. That compulsory process of a bench warrant or a warrant of arrest is dependent for its validity upon disobedience of a previously issued subpœna is not found in any federal or state statute (U. S. Code Title 28, Section 659; Massachusetts General Laws 1921, Chapter 277, Section 70; New York Code of Criminal Procedure, Section 618b) or in any judicial decision that has come to my attention. The fact that resort to such process usually follows disobedience of a subpœna is merely an indication of its customary use, not of its invalidity when in a given exigency it is used otherwise.

Turning to the general law on which I base my dissent, I am constrained gravely to state and emphasize my conviction that the action (as distinguished from legislation) of the Senate of the Congress of the United States, a constituent body of an independent department of the government, is not subject to review and annulment by the judicial department. For a more particular statement of my views on the law I refer and subscribe to the terse yet entirely adequate opinion which Judge Dickinson rendered when he dismissed the petition for a writ of habeas corpus.

A true copy. Teste: ————, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 85] In United States Circuit Court of Appeals for the Third Circuit

March Terms, 1928

No. 3856 (List No. 98)

U. S. ex Rel. T. W. Cunningham, Appellant,

vs.

D. S. Barry, Sergeant-at-Arms, United States Senate, et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Judgment—Filed Nov. 26, 1928

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed and the cause remanded to the said District Court with instructions to discharge the petitioner.

Philadelphia, November 26, 1928.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

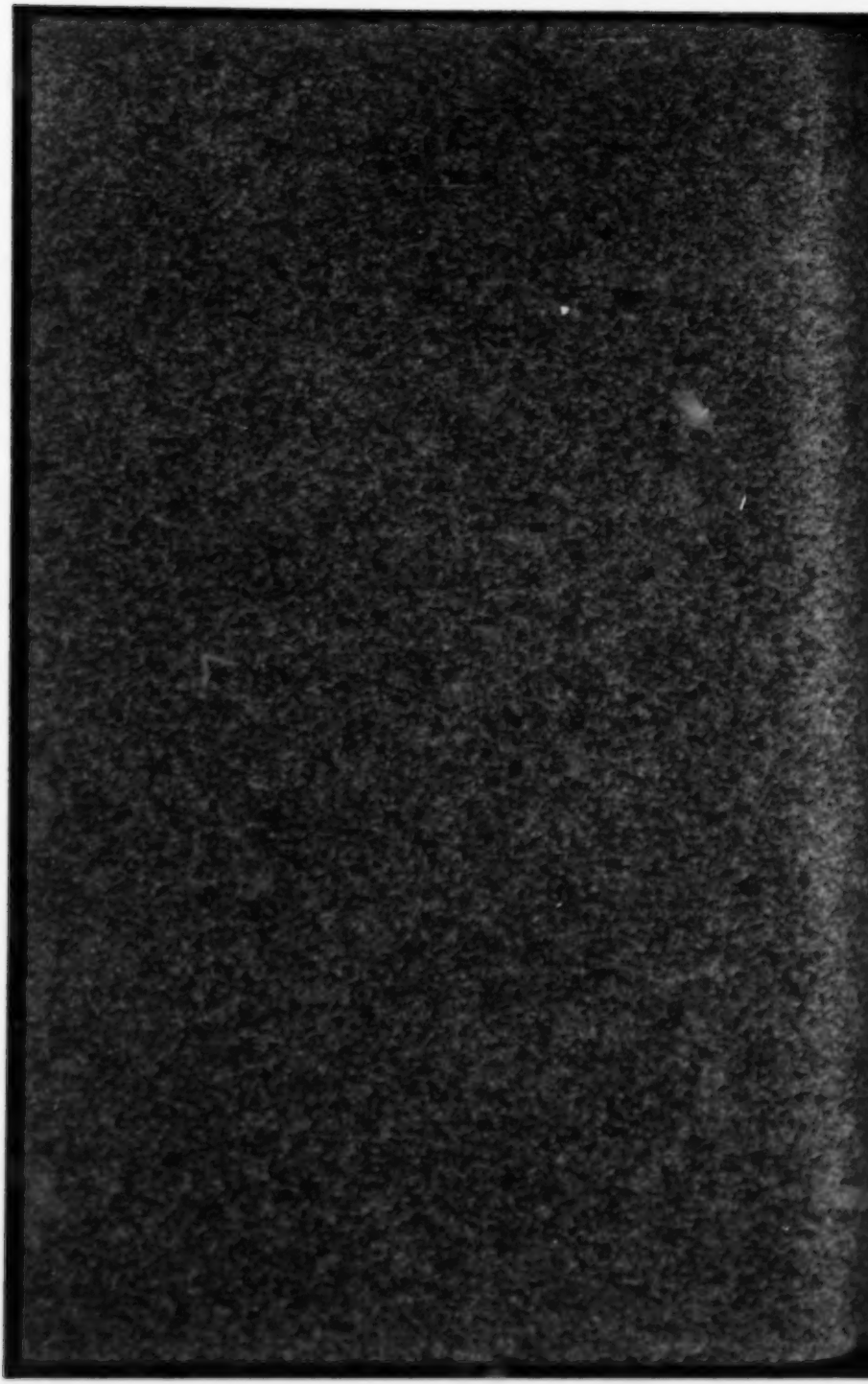
[fol. 86] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 25, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6527)



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IN THE

Supreme Court of the United States

October Term, 1928

DAVID S. BARRY, Sergeant-at-Arms of the United States Senate, and JOHN J. MCGRAIN, Deputy Sergeant-at-Arms, *Petitioners,* *against* UNITED STATES OF AMERICA *ex rel.* THOMAS W. CUNNINGHAM, *Respondent.*	No. 647

BRIEF FOR PETITIONERS.

This is a review, upon Writ of Certiorari, of a decision of the Circuit Court of Appeals for the Third Circuit, which reversed a judgment of the District Court for the Eastern District of Pennsylvania. The judgment of the District Court remanded respondent to the custody and control of your petitioners, and discharged a writ of *habeas corpus*, which was granted by the District Court March 26, 1928, upon a petition setting forth that respondent was unlawfully restrained of his liberty by your petitioners under claim of authority of a warrant for his arrest and production at the bar of the United States Senate.

Opinions in the Courts Below.

The opinion of the District Court for the Eastern District of Pennsylvania is printed at page 47 of the Record, and in 25 Fed. (2d) 733. The opinion of the Circuit Court of Appeals for the Third Circuit is printed at page 58 of the Record, and in 29 Fed. (2d) 817.

Grounds of Jurisdiction of This Court.

The judgment of the District Court was entered April 20, 1928. An appeal was taken to the Circuit Court of Appeals for the Third Circuit, and that Court reversed the judgment of the District Court, on November 26, 1928. The jurisdiction for this review is based upon the Writ of Certiorari granted by this Court on February 25, 1929, under the authority of United States Code, Title 28, Sec. 347 (a).

Questions Presented.

The broad question presented for the consideration of this Court is whether the Senate has power to issue a warrant of arrest to compel the presence of a witness at its bar, there to answer questions which he refused to answer before a committee of the Senate engaged in an inquiry to aid in the judging of the election and qualifications of a Senator elect, and whether the decision in *McGrain* v. *Daugherty*, 273 U. S. 135 is applicable to such a situation.

The Facts.

The case was heard in the District Court upon the petition, return and traverse. The facts appearing therefrom are briefly as follows:

The warrant under which respondent was arrested was issued by Charles G. Dawes, Presiding Officer of the Senate, to David S. Barry, Sergeant-at-Arms, under date of March 24, 1928, commanding the latter, in pursuance of the order of the Senate made the same day, "to forthwith arrest and take into custody and bring to the bar of the Senate Thomas W. Cunningham" (Rec., p. 10). By endorsement on the warrant, petitioner Barry deputized petitioner McGrain to serve the writ. The resolution referred to in the said warrant, adopted by the Senate on the date thereof, recited that

> "it appears from the report of the Special Committee Investigating Expenditures in the Senatorial Primary and General Elections that a witness, Thomas W. Cunningham, twice called before the Committee making inquiry as directed by the Senate under Senate Resolution 195 of the Sixty-ninth Congress, declined to answer certain questions relative and pertinent to the matter then under inquiry."

The resolution thereupon directed the President of the Senate to issue his warrant commanding the Sergeant-at-Arms or Deputy to take into custody the body of the said Cunningham wherever found,

> "and to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await the further order of the Senate" (Rec., p. 11).

Senate Resolution 195, 69th Congress, thus referred to, was adopted May 19, 1926, the day following the

Pennsylvania primary elections, and directed that a special committee be appointed to investigate campaign expenditures in the nomination and election of Senators in the election of November, 1926 (Rec., pp. 5-6).

On July 29, 1926 (after the adoption of Resolutions 227 and 258 of the 69th Congress authorizing the employment of clerical assistance and appropriating $50,000 out of the Contingent Fund for the use of the Committee (Rec., p. 35), respondent, who had been duly subpoenaed (though he had evaded the service of the subpoena for more than two weeks by taking a "vacation" in New Jersey) appeared before the Committee and testified under oath that he was Clerk of the Quarter Sessions Court; that during the primary election in question he had been connected with the Republican organization of Philadelphia County, which was supporting Vare for Senator; that he had given to Thomas F. Watson, the Chairman of that organization, $25,000 in cash on April 10, 1926, and $25,000 more on April 13, 1926.

Questioned with regard to possible sources of the money, he answered that he had been Clerk of the Quarter Sessions Court for twenty-one years, and that his present salary was $8,000 a year; that he had never inherited a dollar in his life; but he refused to answer whether or not he had made money speculating in stocks and bonds. He testified that he had given the money to Watson in cash, which he took from his pocket when he gave it. He refused to answer where he got it from to put in his pocket, but he said he had not drawn it from a bank. He refused to tell how long the money had been in his possession; whether or not he had ever returned it in any form to any taxing authority, local, State, or Federal; in what bank he had his account, although he admitted he had an official account and a personal ac-

count. He simply insisted that the money was his own private funds, and refused to give any information regarding it, although he did state that in keeping the source of the money "under cover", he was attempting to emulate former Senator Penrose, who was, in Cunningham's words, "a past master in not letting his right hand know what his left hand done." His testimony is printed in the Record, pages 14-28.

Respondent was accompanied in his attendance before the Committee, by his counsel, Mr. Golder, who advised him that he need not answer the foregoing questions, because they related to his personal affairs (Rec., pp. 16, 18-24).

On December 22, 1926, the Senate Committee submitted to the Senate a partial report setting forth the foregoing facts relating to respondent's refusal to testify (Rec., p. 33).

On January 11, 1927, the Senate adopted a resolution (No. 324) which set forth that William B. Wilson, of the State of Pennsylvania, had presented a petition to the Senate contesting the election of William S. Vare as Senator from Pennsylvania in the election held November 2, 1926, charging fraudulent and unlawful practices in connection with the nomination and alleged election of said Vare; that the Special Committee organized under Senate Resolution 195 above mentioned, by direction of the Senate, had entered upon an investigation pertaining to the alleged corrupt practices in the election held November 2, 1926, and in the primary preceding it, in the State of Pennsylvania, and, therefore, *resolved* that the said Special Committee, in addition to the powers conferred in said resolution, be empowered to take possession of the ballot boxes, tally sheets, etc., and preserve

all evidence as to the various matters alleged in the said petition of said Wilson, and that said Committee be vested with all powers of procedure with respect to the subject matter of this resolution that it possessed under Resolution 195 (Rec., pp. 35-37).

The Committee recalled respondent before it February 21, 1927, and repeated the questions previously addressed to him, and met with the same refusal (Rec., pp. 28-33). The Committee called the witness' attention to his previous refusal, and stated that they desired to give him an opportunity to reconsider, but he stood on his refusal made at the previous hearing (Rec., p. 32).

On December 9, 1927, at the opening of the first session of the 70th Congress, a resolution was adopted (S. Res. 2), referring to the resolution adopted May 17, 1926, reciting that the Committee had reported the evidence which, without substantial dispute, showed that at the primary election at which said William S. Vare is alleged to have been nominated a candidate for the United States Senate, there were numerous and various instances of fraud and corruption in behalf of the candidacy of the said Vare, and that there was spent on his behalf in said primary election by him and his friends a sum exceeding $785,000, which facts had not been controverted by him; set forth the official communication received by the Senate on January 10, 1927, from the then Governor of Pennsylvania, and *resolved* that the expenditure of such a large amount of money to secure the nomination of said Vare as a candidate for the United State Senate *prima facie* is contrary to sound public policy, etc.; that the claim of the said Vare to a seat in the Senate was thereby referred to said Special Committee of the Senate, with instructions to grant such fur-

ther hearing to him, and to take such further evidence on his own motion as should be proper in the premises, and to report to the Senate; and that until such report and final action thereon, said Vare be denied a seat in the Senate (Rec., pp. 39-41).

On December 12, 1927, the Senate adopted Sen. Res. 10, Seventieth Congress, confirming and readopting all the resolutions adopted by the Sixty-ninth Congress in this matter (Rec., pp. 41-42).

On December 17, 1927, a further resolution was adopted (S. Res. 68), authorizing the Committee on Privileges and Elections to hear and determine the pending contest between William S. Vare and William B. Wilson, involving the question whether one or the other of them was entitled to membership in the Senate, and further ordering that said Committee might

> "consider such evidence as has heretofore or may hereafter be taken by the said special committee appointed pursuant to Senate Resolutions 195, 223, 258 and 324, Sixty-ninth Congress, and Senate Resolution 10, Seventieth Congress; and the said special committee is hereby authorized, in its discretion, to consider such evidence as may be taken by the said Committee on Privileges and Elections" (Rec., pp. 42-43).

On March 28, 1928, the said Special Committee made a report of the proceedings taken by it pursuant to the aforesaid resolutions; reported in full the testimony given by the respondent, showing his refusal to answer the questions submitted to him as aforesaid, referred to its previous report, and called the attention of the Senate

> "to the defiant and contumacious conduct of said witness, Thomas W. Cunningham, and renews the recommendation made in its report of February

> 28, 1927, that the said Thomas W. Cunningham be adjudged in contempt of your Committee and of the Senate of the United States" (Rec., p. 34).

The Senate did not adjudge respondent to be in contempt as recommended, but instead, adopted the resolution above referred to (S. Res. 179), (Rec., p. 11), upon which the warrant of arrest was issued and under which respondent was taken into custody, and to review which this *habeas corpus* proceeding was brought.

The petition for the writ of *habeas corpus* is based upon the allegation that respondent was arrested under a warrant

> "by reason of an alleged contempt committed by your petitioner against the said Senate of the United States" (Rec., p. 3).

And

> "6. That by reason of Petitioner's refusal to disclose his private and individual affairs, the said Senate of the United States improperly, illegally and without any warrant or authority, under the Constitution of the United States or otherwise, *has adjudged your petitioner to be in contempt and has issued its warrant* to the said David S. Barry to apprehend your petitioner under and by virtue of which your petitioner is now in illegal durance" (Rec., p. 4). (Italics ours.)

Respondent in his petition denied that he had been guilty of any contempt against the Senate, averred that the Senate had passed a resolution (No. 195), a copy of which was annexed to the petition, directing an investigation into the expenditure of moneys to influence nominations for membership in the United States Senate at the general election to be held in November, 1926; averred

that neither House of Congress had power to legislate or to regulate in any manner regarding primary elections, and, therefore, that the Senate was without power to pass said resolution; notwithstanding which, respondent alleged he had attended a meeting of the Committee appointed pursuant to said resolution, and voluntarily testified that he had contributed $50,000 to the Republican City Committee of Philadelphia, but he had refused to disclose certain other information relating to his private and individual affairs, whereupon the Senate, without warrant or authority, adjudged him to be in contempt, and issued its warrant to appellee, Barry, to apprehend respondent, under and by virtue of which warrant he was in durance. He, therefore, prayed to be released (Rec., pp. 3, 4).

Petitioners, in their return to the writ, denied that the Senate had adjudged respondent to be in contempt, and averred that they held him by virtue of a warrant issued by the President of the Senate, requiring them

> "to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate through its said Committee or the President of the Senate may propound, and to keep the said Thomas W. Cunningham in custody to await the further order of the Senate" (Rec., p. 11).

Respondent filed a traverse to the return which raised no issues of fact (Rec., pp. 55-60).

The matter was argued before DICKINSON, *J.*, who discharged the writ of *habeas corpus* and remanded respondent to the custody of petitioners, holding the warrant to be what the Senate declared it to be, a warrant of arrest to compel testimony; holding that *McGrain* v.

Daugherty, 273 U. S. 135, had settled the power of the Senate to issue such a process; and holding that the issue of a subpoena, followed by a neglect of the witness to appear, while usual in cases of arrests to testify, was not necessary and was within the sound discretion of the court issuing the warrant, in this case the Senate.

Appellant applied to the District Court for bail pending appeal, which was denied, with leave to apply to the Circuit Court of Appeals (Rec., pp. 55-56). Such application was made, and supersedeas allowed by Judge DAVIS, of that court.

A majority of the Circuit Court of Appeals (Judge WOOLLEY dissented), reversed the judgment of the District Court on the grounds: first, that in spite of the clearly expressed intent of the Senate to attach to testify, the real purpose was to punish for a contempt, improperly because the questions asked were not pertinent to the inquiry; second, because, granted the process was an attachment to testify, a subpoena duly served on the witness, and his neglect to appear in response thereto, were necessary prerequisites to a valid attachment for that purpose.

Petitioners applied to this court for a writ of certiorari, which was granted February 25, 1929.

ARGUMENT.

POINT I.

The Circuit Court of Appeals erred in holding the warrant under authority of which respondent was arrested to be a process in a proceeding to punish for contempt, and in not holding it to be a warrant of attachment to compel respondent's presence and testimony.

(a) The purpose of the Senate to compel respondent's presence and testimony is obvious from the face of the warrant and resolution.

The warrant reads as follows:

> "The undersigned, presiding officer of the Senate, by virtue of the power vested in me, hereby command you in pursuance of the order of the Senate, this day made, to forthwith arrest and take into custody and bring to the bar of the Senate Thomas W. Cunningham" (Rec., p. 10),

and is signed by Charles G. Dawes, as Presiding Officer. The order of the Senate referred to in the warrant is that contained in Senate Res. 179, 69th Cong., which provides:

> "Whereas it appears from the report of the Special Committee Investigating Expenditures in Senatorial Primary and General Elections that a witness, Thomas W. Cunningham, twice called before the Committee making inquiry as directed by the Senate under Senate Resolution 195 of the Sixty-ninth Congress, declined to answer certain questions relative and pertinent to the matter then under inquiry:
>
> "Resolved, that the President of the Senate issue his warrant commanding the Sergeant-at-

> Arms or his deputy to take into custody the body of said Thomas W. Cunningham wherever found, and to bring the said Thomas W. Cunningham before the bar of the Senate, then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate."

All of respondent's proceedings in the Courts below have been based upon the assumption that this resolution ordered his arrest to answer for a contempt. In his petition for the writ of *habeas corpus*, he alleged that he was restrained under a warrant commanding his arrest "by reason of an alleged contempt committed by your petitioner against the Senate of the United States" (Rec., p. 3). The petition continues:

> "Your petitioner is not now and has never been guilty of a contempt against the United States Senate" (Rec., p. 3).

That this assumption is unfounded will be obvious from an examination of the Record. Nowhere in the warrant of arrest, or in the Resolution ordering the warrant of arrest, or in any previous or subsequent resolution of the Senate, is there any sort of an adjudication that respondent was guilty of a contempt, nor any expression of a purpose to try him for a contempt. The only possible basis for such an assumption seems to be the recommendation that Cunningham be adjudicated in contempt, contained in the report of the Committee (Rec., p. 34), upon which recommendation the Senate did *not* act, and respondent's own fear and expectation that he would be adjudged guilty of a contempt.

The record shows that the Senate did not attempt to punish Cunningham for his contumacy, but instead, sent the Committee's report to the United States Attorney for the District of Columbia for proceedings under the Act of January 24, 1857 (11 Stat. 155), relating to the punishment of contempt as a crime (Rec., p. 45). The Senate itself directed the issuance of the warrant precisely as it did in the *Daugherty* case as an "auxiliary process to compel him to give the testimony sought by the subpoenas" (273 U. S. at p. 158).

The Senate may well have thought that although a witness should contumaciously refuse to answer embarrassing questions put to him by a Committee, he would feel differently when called to the bar of the Senate itself.

It is well settled that the Senate has the power to punish for contempt a witness in an inquiry which the Senate had power to make, who refuses to answer questions pertinent to the inquiry.

> *Anderson* v. *Dunn*, 6 Wheat. (U. S.) 204;
> *In re Chapman*, 166 U. S. 661;
> *Marshall* v. *Gordon*, 243 U. S. 521;
> *McGrain* v. *Daugherty*, 273 U. S. 135.

It is also now equally well settled that the Senate has the power to compel the presence and testimony of a recalcitrant witness by a body attachment in the form of an arrest, in a proper case.

> *McGrain* v. *Daugherty*, 273 U. S. 135;
> *Matter of Stewart* (Supreme Court of District of Columbia, Feb. 25, 1928. See copy hereto annexed).

The Senate clearly indicated that it intended to pursue the latter course, and not the former. It did not

declare respondent guilty of a contempt, said no word about contempt, but clearly indicated its purpose was to have Cunningham brought

> "before the bar of the Senate, then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, * * *" (Rec., p. 11).

With the two courses so clearly open to the Senate, and with so clear an expression of its intention to proceed under the one, and not under the other, it is difficult to see how a court could justify a construction of the resolution as authorizing a proceeding for contempt.

The majority of the Circuit Court of Appeals has, however, so construed the resolution, and BUFFINGTON, *J.*, in his opinion, assigns these reasons:

> "An examination of the proceedings shows that this is not the case of a person who refused to obey a subpoena to appear before the Senate, as was the fact in McGrain v. Daugherty, 273 U. S. 135, but of a witness who has duly twice appeared before a committee of the Senate and submitted himself to examination, but has rightfully or wrongfully declined to answer certain questions then asked. The record shows that such refusal to answer certain specific questions was the sole ground of the Senate's action and therefore the sole ground of Cunningham's arrest. To contend the warrant of arrest was a subpoena to appear and testify, and not an arrest for contempt after he had duly appeared is to ignore the real situation. If the warrant of arrest is not based on the witness's alleged contempt in refusing to answer the questions propounded by the committee, it

> has no ground justifying its issue, for he did duly appear. And if it is regarded as an arrest to procure Cunningham's attendance as a witness, a subpoena served on him and neglect on his part to appear constitute the prerequisite preliminaries before an attachment for non-attendance issues" (Rec., p. 67).

Consideration of this language of Judge BUFFINGTON shows immediately that the real reason for the construction was not that the Circuit Court of Appeals thought that the resolution of the Senate did attempt to punish for a contempt, but that any other construction, *i. e.*, that the arrest was to compel testimony, was, on its face, invalid. That Court examined the Record, noticed that Cunningham's refusal to answer constituted *prima facie* a contempt for which he could have been punished, considered that an arrest to compel testimony was improper in the absence of a subpoena, and concluded that the only valid purpose the Senate could possibly have had was to punish for a contempt. But, by proceeding to hold the warrant invalid even under its alternative construction, the Circuit Court has destroyed the basis for its holding.

Its conclusion is, we repeat, contrary to every canon of construction. If there were any doubt as to the nature of the arrest intended by the Senate, such a method of construction might be used, but when the nature of the instrument is so clearly and expressly declared, it should stand or fall on its own merits, especially since the Senate had the power to issue this warrant for the purpose of compelling respondent's presence and testimony.

This was recognized by DICKINSON, *J.*, in his opinion discharging the writ. He said:

> "As we analyze the facts, the only question presented is whether the Senate in the course of

an inquiry in aid of legislation or when sitting as a Court to determine the election returns and qualifications of those claiming the right to sit as members of that body has lawful power to enforce the attendance of any one not a member to give testimony. This question we find to have been authoritatively answered in the cited case." (*i. e., McGrain* v. *Daugherty.*) "Every Court must have this power or cease to function and the Senate must likewise possess it. The formal resolution declares that the attendance of the relator is required for this purpose. We are not asked to find, and surely could not find, that the real purpose was other than has been declared" (Rec., pp. 51-52).

WOOLLEY, *J.*, recognized it in his dissenting opinion in the Circuit Court of Appeals. He said:

"I distinguish between the case as stated and the case may [made] by the record, as I read it. The court has stated the case as though the Senate of the United States had in fact adjudged Cunningham, the relator, guilty of contempt for refusing to answer questions which its committee had theretofore propounded to him, and, standing on that predicate it has entered into a discussion of the relevancy and validity of the questions asked and the relator's justification for refusing to answer them. As I read the record there was no such adjudication for contempt. There was nothing more than a recommendation by a committee that the Senate adjudge him in contempt. On that recommendation the Senate did not act. In truth, the Senate has neither tried nor convicted Cunningham for contempt. Nor has it indicated a purpose to try him. All it did was to authorize the issuance of a warrant of arrest, which, as I read the record, is the real beginning of the con-

> troversy here on an appeal from an order of a district judge dismissing the petition for a writ of habeas corpus. The warrant of arrest is not a contempt process, original or execution. It is an exercise by the Senate of the United States of its power to call a person before it and interrogate him in regard to matters of legislation or of determining 'the election, returns and qualifications' of one claiming the right to sit as a member of that body" (Rec., pp. 70-71).

In truth, the majority of the Circuit Court of Appeals admitted that there was in fact no purpose to punish respondent for a contempt, when it was forced to rely, to establish the "real purpose" of the Senate, on its holding that the expressed purpose would have rendered the warrant invalid.

(b) The compelling of the presence and testimony of respondent before the Bar of the Senate after a refusal to answer questions put to him by a member of a committee, is in full accord with Congressional precedent.

The Speaker of the House of Representatives said in *Woodley's* case (1868), reported in Hinds' Precedents of the House of Representatives, Vol. 3, Secs. 1685, *et seq.*:

> "The uniform usage of the House from the Twelfth Congress down to the present time has been that where a witness is before a committee of the House that is authorized to send for persons and paper and refuses to testify he is first to have an opportunity to explain to the House of Representatives why he refuses to testify. He cannot be held to answer until the committee shall present the question to the House and the House

> shall, at its bar, through the Speaker, present to him the question and ascertain why he has refused to answer it."

This is fully confirmed by *Stewart's* case, in 1873, at § 1689 of Hinds' Precedents; *Irwin's* case, 1874, § 1690; and *Barnes'* case, in 1877, § 1695. The same rule is stated in Jefferson's Manual, Sec. 13.

This was exactly what the Senate did in this case. The witness had appeared before the Committee, and refused to answer certain questions. It would have been proper, perhaps, for the whole Committee to have dealt with him, but instead the matter was referred to the Senate, which followed the "uniform usage" and ordered respondent brought *to its bar*, to answer there the question he had refused to answer before the Committee. For that purpose he was arrested, and for no other. Whether the Senate might have adjudged him in contempt on the Committee report, or whether it would have adjudged him in contempt had he refused to answer the questions put to him at its bar, is immaterial. Its immediate purpose was clear, to have Cunningham questioned at its bar, and even if the "real purpose" was to ask him the questions and then punish as a contempt his expected refusal to answer them, as was the case in the early precedents we have cited, it does not alter the fact that there was no word in either the resolution or the warrant about contempt, and that there could not be, until respondent had been brought to its bar and refused to answer. The Circuit Court of Appeals, in its opinion, treated the probable result as the real purpose, instead of giving effect to the clearly expressed immediate purpose, even though the probability of the result was based on expected, though independent, acts of respondent.

The Senate's action in this case is exactly in line with that in the notorious case of *Stewart*, in the 69th Congress, who refused to answer certain questions regarding the naval oil scandals. He was arrested on an exactly similar warrant and resolution, and the Supreme Court of the District of Columbia, in discharging his writ of *habeas corpus*, held the process to be an attachment to compel testimony. Stewart thereupon answered the questions, before an appeal could be argued. A copy of Judge BAILEY's opinion in that case, which is unreported, is hereto annexed.

POINT II.

The inquiry in connection with which respondent was arrested was within the constitutional powers of the Senate, to judge of the elections, returns and qualifications of its members, and to make or alter regulations as to the times and manner of holding elections for Senators.

By the Constitution of the United States, all legislative powers granted therein are vested in the Congress of the United States, consisting of the Senate and the House of Representatives. As amended by the 17th Amendment, the Senate is composed of two Senators from each State, elected by the people thereof for six years. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

Article I, Section 3, provides:

> "No Person shall be a Senator who shall not have attained to the Age of thirty Years and been

nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

Article I, Section 4, provides:

"(1) The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof: but the Congress may at any time by Law make or alter such Regulations except as to the Places of chusing Senators."

Article I, Section 5, provides:

"(1) Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, * * *."

In *McGrain* v. *Daugherty*, 273 U. S. 135, it was distinctly held that each House of Congress has power to institute inquiries and to exact evidence touching subjects within its jurisdiction, and on which it was disposed to act. In that case, the inquiry was upheld as necessary to enable the Senate, through one of its committees, to require evidence needed to enable it efficiently to exercise a *legislative* function under the Constitution. The Court, in that case, as in the case of *In re Chapman*, 166 U. S. 661, held it immaterial that the resolution directing the investigation did not in terms avow that it was intended to be in aid of legislation, as it did show that the subject of the investigation was one on which legislation could be had, and would be materially aided by the information which the investigation was calculated to elicit (273 U. S. 135, 177).

In the case at bar the resolutions under which the inquiry was being held and in connection with which

respondent was subpoenaed to testify, were in aid of the powers vested in the Senate, (*a*) by Article I, Sec. 5, to be the judge of the election and qualifications of its members, and (*b*) its legislative powers under Article I, Sec. 4, to make or alter regulations as to the times and manner of holding elections for Senators.

That the Senate was in this case engaged in judging the elections, returns and qualifications of its members, appears from the original Resolution appointing the Committee to investigate campaign expenses (No. 195, Rec., p. 5). Even if this purpose were not expressed, it must be deemed that the Senate is exercising a constitutional function and the aim which would justify the Resolution must be presumed to be its object. Thus, in the *Daugherty* case, *supra*, the original Resolution expressed no legislative purpose, but as such purpose was the only justification for the inquiry there ordered, it was presumed to be its object; the Court saying (p. 178):

> "The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. In the *Chapman* case, where the resolution contained no avowal, this Court pointed out that it plainly related to a subject-matter of which the Senate has jurisdiction, and said 'We cannot assume on this record that the action of the Senate was without a legitimate object'; and also that 'it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded.' (166 U. S. 669-670)."

Here there are several entirely constitutional purposes for which this investigation may be held: first, the *judicial* purpose of judging of the elections, returns and qualifications of members elected in November, 1926, which obviously must have been the primary purpose; and secondly, which might well be also held the *legislative* purpose of considering what modification or extension of the Corrupt Practices Act might be enacted.

In any event, the appellant's second examination before the Committee was preceded by Resolution 324, expressly reciting the election contest, and the subsequent Resolutions adopted Dec. 9, 1927, Dec. 12, 1927, Dec. 17, 1927, referring the claims to the Committee, emphasize this as the primary purpose of the inquiry. (Exhibits I, Rec., p. 35; K, Rec., p. 39; L, Rec., p. 41; M, Rec., p. 42.)

The same resolution under which the proceedings against respondent were initiated, viz.: S. Res. 195, 69th Congress (Rec., pp. 34-5), was before this Court in *Reed* v. *County Commissioners*, 277 U. S. 376, and it was there held it should be construed, having regard to the power possessed and customarily exerted by the Senate. The Senate, said this Court,

> "is the judge of the elections, returns and qualifications of its members. Article I, § 5. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections. It has been customary for the Senate—and the House as well—to rely on its own power to compel attendance of witnesses and production of evidence in investigations made by it or through its committees. By means of its own process or that of its

committee, the Senate is empowered to obtain evidence relating to matters committed to it by the Constitution. *McGrain* v. *Daugherty*, 273 U. S. 135, 160, 161, 167, 174. And Congress has passed laws calculated to facilitate such investigations. R. S. §§ 101, 104, U. S. C. Tit. 2, §§ 191-194. • • • Authority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose." (P. 388.)

POINT III.

The Senate, in judging of the elections, returns and qualifications of its members is not limited to the enforcement of prohibitions contained in Article I, Section 3, Clause 3.

It is clear that the provisions are merely limitations and not qualifications and are therefore not exclusive. The language of the Constitution is:

> "No Person shall be a Senator who shall not have attained to the Age of thirty Years and been nine Years a Citizen of the United States, and who shall not when elected be an Inhabitant of that State for which he shall be chosen."

Respondent's

The argument on this point is sustained by construing the language as if it read as follows:

> "Every person who shall be elected a Senator must be seated if he shall have attained to the age of thirty years and been nine years a citizen of the United States and when elected shall be an inhabitant of that State for which he is chosen."

But no such distortion of the plain language of the Constitution is permissible. The provisions in the Constitution are not *qualifications*, but *disqualifications*.

In a very scholarly study of the right of the Senate to determine the qualifications of its members, by Mr. Price Wickersham, an attorney of Kansas City, Missouri, printed as Senate Document No. 4, 70th Congress, First Session, it is said (at p. 17) that

> "Charges touching the elections, returns, and qualifications of Senators-elect have heretofore been made in 46 cases. Twenty-nine times the Senate has accepted the credentials of such Senators-elect and investigated the charges afterwards, and 16 times the Senate has refused to seat the Senators-elect until the charges were investigated. Such practice has definitely established the right of the Senate to exercise its discretion as to whether it will seat before investigating, or investigate before seating."

The writer referred particularly to the contests over the seats of one Whittemore, elected to the House of Representatives from North Carolina, in 1870, and Messrs. Cannon and Roberts elected to the House from Utah in 1882 and 1900, respectively.

In the case of Whittemore, after his election it was charged that he had sold a cadetship for $500. The Committee to which the charges were referred for investigation, reported that they were true, and recommended that he be not seated. Thereupon, Whittemore resigned, returned to North Carolina, and was re-elected from the said district, with full knowledge on the part of the electorate of the charges against him. A second time the House of Representatives declined to seat him, referred the matter again to a Committee, which reported that

the charges were true and recommended he be not seated, and this recommendation was adopted by the House.

In the cases of Cannon and Roberts, while the credentials of both were in due form, the House declined to seat them, and referred the matter to a committee to investigate charges that they had been living in open polygamy. The Committee reported, recommending that they be not seated, and although polygamy was not by the Constitution made a disqualification for office, the House, by an overwhelming vote, approved the action of the Committee, and refused to seat the Members-elect.

The further point has been raised that under the provisions of Article I, Section 5, making the Senate

> "the Judge of the Elections, Returns, and Qualifications of its own Members",

one must be seated and sworn as a member before an investigation is possible, but it scarcely merits serious consideration. It was disregarded in the 16 cases above referred to. It could hardly be contended that the power given to the House of Representatives by Article I, Section 2, Clause 5, to "chuse their Speaker * * *", means that the House can only choose one who is already Speaker. The practical construction placed upon the word "member" by legislation is entirely at variance with appellant's contention. Thus, for example, Chapter 7, Title 2, Section 201, of the U. S. Code, derived from R. S. 105 reads as follows:

> "Whenever any person intends to contest an election of any Member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice, in writing, to the Member whose seat

> he designs to contest of his intention to contest the same, and, in such notice, shall specify particularly the grounds upon which he relies in the contest."

In this paragraph, the member-elect is referred to as a member from the time of the determination of the result of the election by the legal officer or board of canvassers. Not only as a matter of plain English, but in view of the obvious purpose of the clause, it is clear that no such construction is permissible. To corrupt an election is to poison the fountain of representative government at its source, and to hold that the Senate is bound to accept anyone, even one who openly and notoriously had corruptly procured his election, and permit him to vote in the councils of the nation while the matter was being investigated, would be to make derisory the powers of the body to determine the qualifications of its own members.

The language in Article V of the Constitution "that no State without its Consent, shall be deprived of its equal Sufferage in the Senate", has no reference to such a condition as we are considering.

The contrary contention was made in the debate upon a motion to reject Roberts, member of Congress elect from Utah in 1900, where it was contended that the right of the State or district to name and select whomsoever it chose, was one of those rights retained by the States when they entered the Union (see Constitution, Amendments, Art. X). But in *Collector* v. *Day*, 11 Wall. 113, the Court said of Article X, that it does not contain any new grant of power to the States or people, but is simply declaratory of a pre-existing condition.

Judge STORY says (1 Constitution, Sec. 627):

> "The truth is, that the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. Each is an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. It is no original prerogative of state power to appoint a representative, a senator, or president for the union. Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people. Before a state can assert the right, it must show, that the constitution has delegated and recognized it. No state can say, that it has reserved, what it never possessed."

Provision is made in the 17th Amendment to the Constitution for temporarily filling any vacancy which may occur in the representation of a State in the Senate. This may be done either by an election or, if the Legislature of the State so provide, the Executive may make a temporary appointment until the people fill the vacancy by election.

POINT IV.

The Senate had power and jurisdiction to order the arrest of respondent to bring him to its bar to testify, under its judicial power as the sole constitutional judge of the elections, returns and qualifications of its members.

It is provided in the Constitution, Article I, § 5:

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, * * *"

When acting under this provision, the Senate has the powers of a Court. This is conceded, even in the case most narrowly construing the powers of a House of Congress with regard to witnesses, *Kilbourn* v. *Thompson*, 103 U. S., 168 (1880), where the Court said:

> "Each House is by the Constitution made the judge of the election and qualifications of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature" (p. 190).

If the Senate may punish for recusance, *a fortiori*, it may compel attendance and testimony by compulsory process. That such a power is universally available to courts is elemental. That it is likewise available to the Senate has been decided by this Court in *McGrain* v.

Daugherty, 273 U. S. 135, where the relator refused to obey a subpoena *ad testificandum*, requiring him to appear before a Senate committee engaged in an investigation under a resolution of the Senate. The Senate, upon the facts being reported by the Committee, resolved that the President of the Senate issue his warrant commanding the Sergeant-at-Arms, or his deputy, to take into custody the body of the said Daugherty, wherever found, and bring him before the bar of the Senate,

> "then and there to answer such questions pertinent to the matter under inquiry as the Senate might order the President of the Senate pro tempore to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate" (p. 153).

The warrant was issued agreeably to the resolution.

In considering the power of the Senate to issue such a process, the Court referred to the Constitutional grant to Congress of power to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the Constitution in the United States or in any department or officer thereof; held that incidental to the legislative power was the power to secure needed information by such means as had long been treated as an attribute of the power to legislate; and, reviewing the various Congressional enactments, said:

> "They show very plainly that Congress intended thereby (*a*) to recognize the power of either house to institute inquiries and exact evidence touching subjects within its jurisdiction and on which it was disposed to act; (*b*) to recognize that such inquiries may be conducted through committees; (*c*) to subject defaulting and contumacious witnesses to indictment and punishment in

> the courts, and thereby to enable either house to exert the power of inquiry 'more effectually'; and (*d*) to open the way for obtaining evidence in such an inquiry, which otherwise could not be obtained, by exempting witnesses required to give evidence therein from criminal and penal prosecutions in respect of matters disclosed by their evidence" (p. 168).

After reviewing the decisions in *Anderson* v. *Dunn*, 6 Wheat. 204; *Kilbourn* v. *Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 661; and *Marshall* v. *Gordon*, 243 U. S. 521; the Court further said:

> "While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied" (pp. 173-174).

And again:

> "We are of opinion that the power of inquiry —with process to enforce it—is an essential and appropriate auxiliary to the legislative function" (p. 174).

The Court concluded its review of the subject by saying that the investigation ordered into the conduct of the

Department of Justice, pursuant to which the relator was subpoenaed to appear and testify before the Senate Committee, was ordered for a legitimate object; and

> "that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment" (p. 180).

It would be useless to reargue the points there decided, since respondent does not challenge them; the only possible question is whether there is a valid distinction between *McGrain* v. *Daugherty* and this case. The Circuit Court of Appeals made the distinction that in the *Daugherty* case the witness had been subpoenaed and had refused either to appear or to testify, and that in this case the witness had appeared, but had refused to testify. It made this distinction available to respondent by the further holding that a duly issued "subpoena served on him and neglect on his part to appear constitute the prerequisite preliminaries before an attachment for non-attendance issues" (Rec., p. 67).

It is respectfully submitted that the distinction made is incorrect, and that the holding in consequence thereof is erroneous.

(a) Respondent in this case did not fully obey the subpoena of the Senate any more than did Mally Daugherty.

The position of the Circuit Court of Appeals reduces itself to this: that if respondent appeared before the

committee, even though he refused to answer a single question, the subpoena would have been obeyed. This ignores the fact that the command of the subpoena is two-fold: to *appear*, and to *testify*. The language of the subpoena used by the Senate makes this clear: "You are hereby commanded to appear before the select committee * * * then and there to testify what you may know", etc. A disobedience of one part of the command is as much a disobedience of the subpoena as a disobedience of the other.

Since this is the only distinction claimed either by the Circuit Court of Appeals or by respondent, the case would seem to be on all fours with the *Daugherty* case; and that case squarely decided that the Senate had power in an inquiry or proceeding within its Constitutional powers, to compel the presence and testimony of a witness.

(b) Even were this distinction a valid one, the Circuit Court of Appeals erred in holding that a subpoena served on a witness followed by his neglect to appear constituted necessary preliminaries to the issue of the attachment.

Granting for the sake of argument that respondent had fully obeyed the subpoena by his mere presence before the committee, it is still clear that the Senate had power to arrest him to compel his presence and testimony. It is conceded that the Senate has the powers of a court in a proceeding such as this.

Kilbourn v. *Thompson*, *supra*;
McGrain v. *Daugherty*, *supra*.

And it is a familiar proposition that a court *may*, in its discretion, issue a warrant for the arrest of a witness.

It is of course admitted that a court (at least in a civil case) will not ordinarily order the arrest of a witness without a previous disobedience of a subpoena, or a showing that the witness is about to leave the jurisdiction, or something of the sort. But it must be borne in mind that this general practice is the result of the usual way of exercising *discretion*, and has nothing to do with the *power* or the *jurisdiction* of the courts to issue such process. (Chamberlayne's Modern Law of Evidence, Vol. 5, § 3612.) None of the authorities which have heretofore been relied on by respondent goes further than this.

The *power* to issue such summary warrants of attachment is amply demonstrated by the common practice, well known to this Court, of issuing bench warrants for material witnesses in criminal cases.

The power is recognized by statutes. United States Code, Title 28, § 659 (9 Stat. 73), provides:

> "Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person * * * to arrest and bring before him such person."

There is nothing in this statute requiring the previous issue of a subpoena, or a showing that the witness was about to leave the jurisdiction. The sole requirement is that the testimony be competent and necessary, and the other considerations are left to the "discretion" of the judge. This statute has been on the books since 1846, and its constitutionality never has been questioned. It

was cited in *Blair* v. *United States*, 250 U. S. 273, 281 (1919); and was quoted, discussed, and enforced in *In re Aliens*, 231 Fed. 335, by the United States District Court for the Northern District of New York.

General Laws of Massachusetts, 1921, Chap. 277, § 70, contains another similar provision:

> "A justice of a court of record may at any time order a witness for the commonwealth in a criminal case or in a case under sections fifty-two to sixty-four, inclusive, of chapter one hundred and nineteen, pending in such a court to recognize, with or without sureties, to appear and testify at the next or any succeeding sitting of said court, and may issue a warrant to bring such witness before him to recognize as aforesaid."

Here again no proof of intended departure from the jurisdiction, or any disobedience of a subpoena, is required for the issue of the warrant for the witness. This statute has been on the books for over sixty years (Laws of 1868, Ch. 69) and we can find no case in which its constitutionality has been challenged.

A third act of the same nature is § 618-b of the New York Code of Criminal Procedure, which provides:

> "Whenever a judge of a court of record in this state is satisfied, by proof on oath, that a person residing or being in this state is a necessary and material witness for the people in a criminal action or proceeding pending in any of the courts of this state, he may, after an opportunity has been given to such person to appear before such judge and be heard in opposition thereto, order such person"

to give surety for his appearance at the trial, and in case of his neglect or refusal, must commit him to be held until he be properly discharged. The statute goes on:

> "For the purpose of compelling the attendance of any person before him to show cause why he should not be required to enter into such an undertaking to appear as a witness or be committed in default thereof, such judge may at any time, upon the proof on oath required as hereinbefore set forth, make an order in the nature of an attachment requiring such person forthwith, or at such time as may be fixed therein, to appear before such judge. Disobedience of such order shall be punishable as for a contempt of court."

This statute has been several times construed as to constitutionality. The case of *People* v. *Sharp*, 78 Misc. 528 (1912), applied it in a very hard case without doubting its constitutionality. In *People ex rel. Maloney* v. *Sheriff*, 117 Misc. 421, (9121), it was held unconstitutional by a single Justice at a Special Term of the Supreme Court, on the ground that it permitted arrest without showing good reason to believe that the witness would not be on hand when needed at the trial. The case was not appealed, but *People ex rel. Farina* v. *Wallis*, 208 App. Div. 720 (1924), was appealed, and the Appellate Division in that case overruled the *Maloney* case without opinion. This is confirmed by the language of the court in *People ex rel. Bruno* v. *Maudlin*, 206 N. Y. Supp. 523 (1924):

> "The authority holding unconstitutional Section 618-b of the Code of Criminal Procedure (*People ex rel. Maloney* v. *Sheriff*, 117 Misc. Rep. 421, 192 N. Y. S. 553) is in effect overruled by the determination of the Appellate Division, First Department, in a case in which no opinion was handed down. See Cases and Points in *People ex rel. Farina* v. *Wallis*, reported in 208 App. Div. 720, 202 N. Y. S. 945. Therefore the statute in question is constitutional."

The procedure of the Senate in the case at bar was, therefore, in line with the generally accepted procedure in criminal cases or in other cases in which the Government is interested, as it is in this case. Even in civil cases, where such procedure would be unusual, the authorities show that it would be constitutional.

These cases and statutes also show to be unfounded the contention made by respondent in his brief in opposition to the issue of the writ of certiorari, that the warrant was violative of the Fourth Amendment, because issued without probable cause. It is clear that the fact that the person arrested is a material witness in a case involving the interests of the people or of the Government, is sufficient cause. But even were more needed, the contumacy of the witness at his hearings before the committee and the difficulty found in serving a subpoena on him for his first examination (Rec., pp. 13-14, 21-22) should be more than sufficient cause.

It is clear, therefore, that the exercise of such a power is possible under the Constitution, and that is all that is necessary to establish the validity of its use by the Senate. For, in the first place, the statutes are merely declaratory of the common law powers inherent in courts, which, under the decisions in *Kilbourn* v. *Thompson*, *supra*, and *McGrain* v. *Daugherty*, *supra*, are available to the Senate in a judicial proceeding such as this; in the second place, even were statutes necessary to confer the power on courts, no statute is necessary to confer it upon the Senate, which has the power under the Constitution (Article I, Sec. 5, Cl. 2) to "determine the Rules of its Proceedings"; and finally, in exercising its separate power to "judge of the elections, returns and quali-

fications of its members", the Senate cannot be made to depend upon the concurrence of the House of Representatives or upon any Statute.

Reed v. *County Commissioners*, 277 U. S. 376.

It is clear that the Senate had both power and jurisdiction to issue the warrant for respondent's arrest.

POINT V.

Since the Senate has jurisdiction to bring the respondent before it by process of attachment, no inquiry should be made by this Court on *habeas corpus* into the reasons which induced it to do so, and he should be remanded to custody.

As the Senate, acting as a court, had the usual power of a court to attach a witness in the matter here under inquiry, as demonstrated above, then under the fundamental rule that a writ of *habeas corpus* challenges only *jurisdiction* to restrain liberty, no inquiry is necessary or proper into the *reasons* upon which the Senate based the exercise of its discretion.

The recitals in Resolution 179 (Ex. D, Rec., p. 11) of the previous double recusance of respondent may strengthen the position of the Senate, as was held in the *Stewart* case, *supra*, regarding a legislative inquiry; but it is wholly unnecessary where, as in the case at bar, the Senate acts in its *judicial* capacity. If the Senate's questions to respondent are to be inquired into at all by a court, it can be only after they have been formulated and put to him at its bar, and he has refused to answer and has been committed to close custody until he shall answer.

Unless this Court were able to say that no question pertinent to the elections, returns or qualifications of members of the Senate elected in November, 1926, could or would be asked of respondent by the Senate on his production at its bar, there can be no basis on which to order his discharge upon *habeas corpus*.

The original resolution of the Senate, adopted April 5, 1926, not only authorized the Committee to investigate the expenditure of money, etc., to influence the *nomination* of any person to be a candidate of a political party or organization for membership in the United States Senate, etc., but also contributions to promote the *election* of any person as a member of the Senate at the general election to be held in November, 1926, and the original examination of appellant on July 29, 1926, had under this resolution, was before the general election. After that election, namely, on February 21, 1927, the respondent was recalled before the Committee, and again asked questions relating to contributions made by him to Chairman Watson of the State Committee.

The propriety of an inquiry into the method and amount of moneys expended to secure the nomination of a candidate, is demonstrated by the provisions of the Pennsylvania Corrupt Practices Act, which define the lawful purposes for which election expenses may be made; require the filing of accounts by candidates; provide for an audit on the petition of five electors, and require the accounts to be accompanied by vouchers for all sums expended exceeding $10. in amount, *and make it unlawful for any candidate or treasurer of a political committee, or person acting as such treasurer, to disburse any moneys received from any anonymous source* (see Act March 5, 1906, P. L. 78, as amended by Act April 18, 1919, P. L. 68; see Pennsylvania Stats. 1920, Secs. 9637-

9656); and *provide for avoiding the election of any candidate who has incurred illegal election expenses or consented to the incurring of illegal election expenses by any person or committee;* illegal expenses being defined to include those of nomination (Penna. Stats., 1920, Sec. 9642).

If, therefore, the contributions of $50,000, admitted to have been made by respondent, were really contributed by an undisclosed donor, and this fact were consented to by the candidate or his committee, his election would have been void, had he been a candidate for a State office; and had he been a candidate for election as a Representative in Congress, it would have been the duty of the Court, upon an audit, to certify the fact to the Governor of the Commonwealth, who should transmit the same to the House of Representatives, and, under the Act of July 24, 1913 (P. L. 995, Sec. 1), and the Act of May 18, 1917 (P. L. 244), if a candidate for the U. S. Senate, probably to the President *pro tempore* of the Senate.

The statutes of Pennsylvania so referred to interweave the primary election system of nomination and the general elections for Senator so completely as unquestionably to make the conduct of candidates in a primary election a proper subject of Senatorial investigation, after a general election, either in aid of its judicial function in judging of the elections, returns and qualifications of its own members, or of its legislative function in considering whether or not it should make or alter the regulations prescribed by the State concerning the times and manner of holding elections for Senators.

If it should appear as the result of the investigation that the conduct of either the primary or the general election for Senator were such that a candidate would have been disqualified for the office had he been seeking a

State office, can it be for one moment contended that the Senate, under its powers to judge the qualifications of its own members, might not refuse to seat that candidate?

Respondent's contention that the Senate has no power to inquire into facts connected with a primary election at which a nominee of each Party was to be selected as candidate at the general election in November, 1926, because of the decision of the Supreme Court in *Newberry* v. *United States*, 256 U. S. 232, is without force. That case involved a conviction of a number of individuals for conspiracy to violate Section 8 of the Corrupt Practices Act of 1910-1911. The Court divided four to four on the proposition that the grant of power to Congress in Article I, Section 4, to make or alter regulations as to the manner of holding elections embraced authority to control Party primaries or conventions for designating candidates. Three Justices concurred with Mr. Justice McReynolds in holding the negative. The Chief Justice (White) and three others voted in the affirmative. Mr. Justice McKenna concurred in Justice McReynolds' opinion

> "*as applied to the statute under consideration which was enacted prior to the Seventeenth Amendment; but he reserves the question of the power of Congress under that Amendment*" (p. 258). (Italics ours.)

The case is not, therefore, decisive on the power of Congress to regulate primary elections within the States, since the adoption of the Seventeenth Amendment, especially as this Court has more recently recognized the direct relation between the primary and the general election, in the case of *Nixon* v. *Herndon*, 273 U. S. 536.

But even if it were decisive, it has no possible bearing on this case, which is concerned not with Congressional regulation of primaries, but with violations of *State* primary laws: which is concerned, not with a criminal prosecution, but with an inquiry to judge of the elections returns and qualifications of a Member-elect of the Senate. In such an inquiry the Senate, being the exclusive judge of the qualifications of its members, has power to compel the testimony of witnesses as to any fact which might reflect upon the character of a Senator-elect, whether in connection with the expenditure of moneys to secure the nomination or the election, or in connection with his general moral conduct.

It is clear, therefore, that there were pertinent questions which could have been asked, and therefore the jurisdiction of the Senate and its power to issue the warrant are beyond question in a *habeas corpus* proceeding. This Court will not, we submit, review the exercise of discretion in a *habeas corpus* proceeding, or in any other judicial proceeding review a discretionary act of the Senate, a co-ordinate branch of the Government.

POINT VI.

If the process should be held to be an attachment to testify, the pertinency of the questions respondent refused to answer is immaterial. If it were a contempt process, the questions were pertinent to the inquiry.

(a) If the warrant was an attachment to compel respondent to testify, the propriety or pertinency of the questions he refused to answer is immaterial.

This proposition is self-evident, for if the purpose of the warrant was to compel the giving of future or prospective testimony, past testimony would be totally irrelevant. If it be granted that the purpose of the Senate is to compel respondent's presence and testimony, it is clear that pertinency of the questions to be asked can not be ascertained and that the only proper inquiry is whether there were pertinent questions which could be asked. That there were such questions is obvious from the discussion in Point V, *supra*.

(b) Even if this were a contempt process, so that pertinency of the questions respondent refused to answer was involved, the questions were clearly pertinent and proper.

Respondent, and the Circuit Court of Appeals, have become confused on this point by the statements in the cases that neither House "possesses the general power of making inquiry into the private affairs of the citizen" (*Kilbourn* v. *Thompson*, 103 U. S. 168; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.) Respondent has

concluded from this and from similar statements that the Senate has no power to ask questions regarding a witness' private affairs. Nothing could be more inaccurate. What this Court said in those cases was, of course, that the Senate had no *general* power to so inquire, *i. e.*, that the Senate has no power to ask questions regarding the private affairs of a citizen without some definite end of public importance in view; that Congress could not go on "a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up." (*Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 444). But where the Senate is engaged in an inquiry properly within its power, and information is pertinent and necessary to its investigation, and is directed to a reasonably certain and specific end, the fact that it involves private affairs of the witness does not make it any less a proper subject of inquiry. It is said in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, where the power of inquiry involved only breaches of the law:

> "The power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law."

In *In re Chapman*, 166 U. S. 661, the Court held pertinent and proper questions of a Senate Committee regarding dealings in sugar stocks by the witness or his firm on behalf of any Senator,—surely an inquiry into the private business of the witness—saying:

> "In *Kilbourn* v. *Thompson*, 103 U. S. 168, • • • it was held that there existed no general power in Congress, or in either House, to make inquiry into the private affairs of a citizen; • • •. The case

> at bar is wholly different. Specific charges publicly made against Senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary. The subject-matter as affecting the Senate was within the jurisdiction of the Senate. • • • We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of the two Houses, they cannot be defeated on purely sentimental grounds" (pp. 668-669).

The rule was reconfirmed in *McGrain* v. *Daugherty*, *supra*, and has never seriously been doubted.

As applied to the facts of this case, it shows the questions to have been unquestionably pertinent. It has been shown that the Senate was engaged in an investigation under its Constitutional power to judge of the elections, returns and qualifications of its members. Fraud and corruption have been alleged in both the primary and general election. Among other things, it was alleged that improper and irregular contributions had been made to the campaign fund of Vare, the Member in question. The Pennsylvania election laws provide that the names of contributors to campaign funds be made public, and avoid any election in which it is shown that such contributions were received anonymously, or in such a manner as to keep secret the name of the contributor. *Penn Stat.* 1920, §§ 9646, 9647.

Respondent, who was highly placed in the counsels of the party which elected Vare, and who had contributed $50,000. to the campaign fund, was called before the Committee and testified that he had contributed a sum more than six times his annual salary and that he had paid it in

cash which he had not drawn from a bank, but refused to answer any questions designed to discover any source from which he might have obtained such a disproportionate amount of money. It is well known to this Court that in recent inquiries conducted by the Senate, it has been shown that contributions were made to political campaign funds and credited to one or more individuals who in truth and in fact were not the actual donors, but who had received the money from persons desiring to remain anonymous, and who had then given the money in their own names to the political manager. The testimony Cunningham did give, coupled with the circumstances of the case, was enough to rouse the gravest suspicion of irregularities, and questions designed to ascertain whether or not Cunningham's contribution was *bona fide* or merely an attempt to cover a violation of the election law, were clearly proper and pertinent.

It cannot be seriously argued that such violations of the governing election law are not matters for the consideration of the Senate in judging of the elections and qualifications of its members. That this Court may take cognizance of such violations, has been demonstrated in Point IV, *supra*.

POINT VII.

The arrest of respondent in this case was not violative of the Fourth Amendment to the Constitution, because unsupported by oath or affirmation.

Respondent contended in his brief in opposition to the writ of certiorari, that the warrant and arrest were violative of the Fourth Amendment, which provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

because the warrant was not supported by oath or affirmation.

This contention is best answered in the language of Mr. Justice Van Devanter in disposing of an exactly similar contention in the case of *McGrain* v. *Daugherty:*

> "We think the legislative practice, fortified as it is by the judicial practice, shows that the report of the committee—which was based on the committee's own knowledge and made under the sanction of the oath of office of its members—was sufficiently supported by oath to satisfy the constitutional requirement" (p. 158).

POINT VIII.

The fact that a new Congress has convened since appellant's examinations is wholly immaterial to this case, whether considered from the viewpoint of the Senate's legislative power, or its judicial power in regard to its own members.

Respondent contended in his brief in opposition to the certiorari petition that, as punishment for contempt could not extend beyond the life of a House, he could not be punished by the 70th Congress for refusing to answer questions in the 69th Congress. Without stopping to point out that the rule referred to concerns punishment (*i. e.*, imprisonment) which is *commenced* during the life of a House, and that the life of the Senate is continuous; it is enough to repeat that the Senate is here engaged in *compulsion* to testify, not *punishment* for refusal to testify.

The fact that the respondent has been recusant in a previous Congress merely puts the case on all fours with *McGrain* v. *Daugherty*, 273 U. S. 135 (1927). There the witness was contumacious in refusing to obey a subpoena issued and served April 11, 1924, during the 68th Congress (65 Cong. Rec. 7217). That Congress expired March 4, 1925 (as the Court observed at page 180), but on January 17, 1927, during the 69th Congress, the Court reversed the order of the District Court which had discharged the witness from custody. The Court based this decision in this particular on the nature of the Senate as a continuing body, saying (p. 181):

> "It is said in Jefferson's Manual" (Senate Rules and Manual, 1925, p. 303): "'Neither

House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose.' But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

"Mr. Hinds in his collection of precedents says: 'The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress'; (Vol. 4, § 4544) and, after quoting the above statement from Jefferson's Manual, he says: 'The Senate, however, being continuing body, gives authority to its committees during the recess after the expiration of a Congress' (Vol. 4, § 4545)."

The Supreme Court further held that, irrespective of the question whether the Senate has chosen to continue the committee during recess (p. 181):

"it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers." (Hinds' Precedents, Vol. 4, §§ 4396, 4400, 4404, 4405.)

In the case at bar, all doubt as to the continuance or revivor of the Committee is removed by Resolutions I,

2 and 10 of the 70th Congress (Return, Exs. J, K and L; Rec., pp. 37, 39, 41). At any rate, the witness is to be brought to the bar of the Senate, rather than before the Committee.

As the same considerations of the continuing nature of the Senate and the continuance or revival of its committees apply equally whether the Senate is engaged in a judicial or legislative function, the discussion above covers both.

POINT IX.

The Order and Judgment of the Circuit Court of Appeals should be reversed, the Order and Judgment of the District Court should be reinstated, the writ of *habeas corpus* discharged, and the Respondent remanded to the custody of the Sergeant-at-Arms (Barry) or his deputy (McGrain) under the warrant of arrest issued by the President of the Senate.

Respectfully submitted,

WILLIAM D. MITCHELL,
Attorney-General.

GEORGE W. WICKERSHAM,
Special Assistant
to the Attorney-General,
Counsel for Petitioners.

APPENDIX.

Copy of Opinion of Mr. Justice Bailey in Supreme Court, District of Columbia, Filed February 25, 1928.

IN THE MATTER *of* ROBERT W. STEWART, *Petitioner.*	Habeas Corpus No. 1488.

It appears that the petitioner, Robert W. Stewart, having been subpoenaed to appear and testify before the Senate Committee on Public Lands and Surveys, appeared before that Committee on February 2nd and 3rd, 1928. He answered certain questions put to him by the Committee but declined to answer certain others, and the Committee reported his refusal to answer to the Senate.

The Senate thereupon directed that a warrant issue directing the Sergeant-at-Arms of the Senate to take the petitioner into custody and bring him before the bar of the Senate to answer such questions pertinent to the matter under inquiry as might be propounded to him, and to keep him in custody to await the further order of the Senate.

The warrant was issued and executed and the petitioner now claims that he is being unlawfully detained by the respondents, the Sergeant-at-Arms of the Senate and his deputy. He rests his claim upon three proposi-nons,

First:

> "The Senate is without power to arrest and attach petitioner for the purpose of compelling him to attend as a witness before the Senate, when at the time of the arrest, the witness was in attendance before the Senate Committee under and in obedience to a subpoena issued by it."

If the Committee was seeking information as a basis for legislation by Congress and if the questions asked the petitioner were pertinent to such inquiry and did not invade any of his constitutional rights, it was his duty to answer, and his refusal to do so could be treated as an act of contempt of the Senate. The Senate might thereupon have had him attached to be brought before the bar of the Senate to answer for his contempt, as has been done in several cases, but instead took a more lenient course in having him brought before the bar of the Senate to answer such pertinent questions as might be asked him there. There was no question but that he had refused to answer as reported by the Committee, and he has no ground to complain that he was to be given an opportunity to purge himself of his contempt by giving his testimony before the Senate instead of being brought before its bar for punishment. The attachment could properly be based on his recalcitrant conduct as a witness before the Committee. The Senate is not necessarily controlled by the practice of the Courts in similar cases.

Petitioner's second and third propositions are:

> "Resolution 101 does not call for information essential for the exercise of the power of legislation, but is an attempt at exercising judicial function, beyond the powers of the Senate, and authorizes an inquiry into the private affairs of individuals."

> "Petitioner answered every question put to him of public interest with respect to the disposition of the bonds held by the Continental Trading Company. The questions he refused to answer dealt with private and personal matters, the answers to which could in no way furnish information essential to the efficient performance of any legislative function of the Senate."

Resolution 101 authorizes an investigation supplementary to one theretofore authorized, and of which the Committee had made no final report. The former investigation had resulted in legislation directing the prosecution of suits, one of which had resulted in the recovery of valuable property of the Government, and in other legislation, and it may be assumed that the Senate had in mind the possibility of the need of further legislation, when the latest resolution was passed. The failure to specify such purpose is not fatal to the inquiry. Where the particular investigation has already formed the basis of legislation, the Court will not assume that some particular phase of a later investigation, supplementary to the former, cannot be made for the purpose of legislation, and that the Senate is transcending its functions under the Constitution.

The petitioner states that he appeared voluntarily before the Committee to give his testimony. He took an oath to tell "the truth, the whole truth, and nohing but the truth". He raised no general objection to the scope of the inquiry but after he had proceeded to answer numerous questions, he finally refused to answer as to his knowledge of anyone who received the Liberty bonds mentioned in the resolution, or whether he had discussed any of the bond transactions with Sinclair, and other questions of similar character. He voluntarily testified

in part, but refused to tell the whole truth, and a partial truth may be as misleading as a falsehood. These questions were clearly relevant to the inquiry and involved no question of privilege. They did not involve the private affairs of the witness, and the witness cannot make such a claim on behalf of others when he does not appear to be acting in a representative capacity. But even such a ground would not be an excuse for failure to answer questions relevant to any matters which were the subject of proper inquiry.

In my opinion the grounds upon which the petitioner refused to testify were frivolous and without legal basis and his attachment was justified.

The writ of *habeas corpus* will be discharged and the petitioner remanded to the custody of the respondents.

JENNINGS V. BAILEY,
Justice.

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